87-1685

No. ____________________

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Petitioner,

vs.

CITY OF SANTA MONICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this case involve a clash between national interests (the free flow of commerce guaranteed by the Commerce Clause) and local interests (the desire to maximize revenues by charging maximum fees for the use of governmentally controlled transportation facilities). In the context of pipelines, these issues were last considered by this Court in *Western Oil and Gas Association v. Cory,* 726 F.2d 1340, 1342 (9th Cir. 1984) *aff'd per curiam* by equally divided Court 471 U.S. 81, 85 L.Ed.2d 61, 105 S.Ct. 1859 (1985). More precisely, the questions here presented are:

1. Pursuant to a franchise issued under applicable state and local laws, an 82-mile pipeline which is part of a network carrying oil in interstate commerce from the Outer Continental Shelf to refineries onshore, passes for 3.9 miles through a city located in an intensely urbanized area. The City does not own its streets in fee but, instead, holds easements for street purposes. For the last 40 years, in order to pass through the City, the pipeline has utilized the subsurface of the City streets. Does the Commerce Clause prevent the City from refusing to renew the franchise unless the pipeline operator agrees to pay a user fee based neither on the cost to the City of services furnished the pipeline nor the market value of the streets but, instead, based entirely on the value of privately owned lands abutting the streets?
2. On a per-mile basis, the franchise fee demanded of the pipeline by the City is 59 times greater than the amount the City charges the local gas company for pipeline use of the streets to deliver natural gas to local inhabitants. However, there is no other *oil* pipeline in the City. Is the court of appeals correct in concluding that the

Commerce Clause does not prohibit discrimination in user fees unless the commodity carried by the local pipeline is also oil?

3. There is no evidence in the record that buildable lands abutting the streets are comparable in value to nonbuildable lands in the streets but, assuming *arguendo* that such evidence might be proffered by the City, should not the issue of the market value of the streets be decided only after a trial on the merits and not on summary judgment?

LIST PURSUANT TO SUPREME COURT RULE 28.1

Shell Oil Company is a wholly-owned subsidiary of Shell Petroleum Inc., a Delaware corporation. The voting shares of Shell Petroleum Inc. are owned, directly or indirectly, 60% by Royal Dutch Petroleum Company, The Hague, The Netherlands, and 40% by The "Shell" Transport and Trading Company, p.l.c., London, England. Royal Dutch Petroleum Company and The "Shell" Transport and Trading Company, p.l.c. are holding companies which together directly or indirectly own securities of companies in the Royal Dutch/Shell Group, the members of which are severally engaged throughout the greater part of the world in one or more phases of the oil, chemical, coal, nuclear energy and metals industries. The following list names the companies in which Shell Oil Company, or each of its subsidiaries, has an ownership interest.

A. SHELL OIL COMPANY

Subsidiary Companies

Ind/Ag Chemicals, Inc.
Pecten Arabian Company
Pecten Cameroon LNG Limited
Pecten Chemicals Inc.
Pecten Export Corporation
Pecten Middle East Services Company
Pecten Trading Company
Pecten Ventures Limited
Pecten Vietnam Company
SES, Incorporated
Shell Agricultural Chemical Company
Shell Capital, Inc.
Shell Communications, Inc.
Scallop Corporation
Shell Credit, Inc.

A. SHELL OIL COMPANY (Cont'd)

Subsidiary Companies (Cont'd)

- Shell Energy Resources Inc.
- Shell Export Company
- Shell Investment, Inc.
- Shell Motorist Club, Inc.
- Shell Pipe Line Corporation
- Shell Polymers and Catalysts Enterprises Inc.
- Triton Biosciences Inc.
- Western Farm Services, Inc.

Affiliated Companies

- Fractionation Research, Inc.
- Gravcap, Inc.
- Heat Transfer Research, Inc.
- Inland Corporation
- Loop, Inc.
- Lucky Chance Mining Company, Inc.
- Mesbic Financial Corporation of Houston
- Oil Companies Institute for Marine Pollution Compensation Limited
- Oil Insurance Limited

B. SHELL CREDIT, INC.

Subsidiary Companies

- Shell Finance Company
- Shell Leasing Company

C. SHELL ENERGY RESOURCES INC.

Subsidiary Companies

Pecten International Company
Shell Gas Pipeline Company
Shell Gas Trading Company
Shell Mining Company
Shell Offshore Inc.
Shell Western E&P Inc.
Scallop Coal Corporation

D. PECTEN INTERNATIONAL COMPANY

Subsidiary Companies

Pecten Argentina Company
Pecten Ash Sham Company
Pecten Bahamas Company
Pecten Belize Company
Pecten Brazil Alagoas Company
Pecten Brazil Alagoas Petroleum Company
Pecten Brazil Amazon Company
Pecten Brazil Amazon Exploration Company
Pecten Brazil Amazon Exploration and Development Company
Pecten Brazil Amazon Petroleum Company
Pecten Brazil Bahia Company
Pecten Brazil Bahia Exploration Company
Pecten Brazil Bahia Exploration and Development Company
Pecten Brazil Bahia Petroleum Company
Pecten Brazil Exploration Company
Pecten Brazil Maranhao Company
Pecten Brazil Maranhao Exploration Company
Pecten Brazil Petroleum Company
Pecten Brazil Rio Grande Do Norte Company
Pecten Cameroon Company
Pecten Canada Limited
Pecten Ecuador Company

D. **PECTEN INTERNATIONAL COMPANY** (Cont'd)

Subsidiary Companies (Cont'd)

Pecten Guinea-Bissau Company
Pecten Malaysia Company
Pecten Malaysia Petroleum Company
Pecten Orient Company
Pecten Overseas Petroleum Company
Pecten Paraguay Company
Pecten Portugal Company S.A.R.L.
Pecten Potiguar Company
Pecten Santos Company
Pecten Santos Exploration Company
Pecten Santos Petroleum Company
Pecten Sarawak Company
Pecten Syria Company
Pecten Syria Petroleum Company
Pecten Tanzania Company
Pecten Tunisia Company
Pecten Victoria Company
Taranaki Offshore Petroleum Company

E. **SHELL MINING COMPANY**

Subsidiary Companies

Bellaire Trucking Company
Pecten Coal International Inc.
R. & F. Coal Company
Triton Coal Company
Turris Coal Company
Billiton Metals Inc.
Billiton Minerals U.S.A. Inc.

F. **SHELL OFFSHORE INC.**

Subsidiary Company

SOI Royalties Inc.

G. **SHELL WESTERN E&P INC.**

Subsidiary Companies

Belridge Farms
Belridge Packing Co.
Chaparro Gathering Co.
Choctaw Pipe Line Company
SWEPI Royalties Inc.
Shell California Offshore Pipeline Inc.
Shell Cortez Pipeline Company
Shell Western Pipelines Inc.

Affiliated Companies

East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Thums Long Beach Company
Van Salt Water Disposal Company
WIDC (Wyoming Industrial Development Corporation)

H. **SHELL CORTEZ PIPELINE COMPANY**

Affiliated Company

Cortez Capital Corporation

I. **PECTEN ARABIAN COMPANY**

Subsidiary Company

Pico Limited

J. **TARANAKI OFFSHORE PETROLEUM COMPANY**

Subsidiary Company

Taranaki Offshore Petroleum Company Limited

K. **SHELL CHEMICAL COMPANY**
(a division of Shell Oil Company)

Affiliated Companies

George Newman & Company
United Scientific, Inc.

L. **PECTEN TRADING COMPANY**

Affiliated Company

Oil Companies Institute for Marine Pollution Compensation Limited

M. **WESTERN FARM SERVICES, INC.**

Subsidiary Company

Pioneer Equipment Co.

N. **SHELL PIPE LINE CORPORATION**

Subsidiary Companies

Butte Pipe Line Company
San Joaquin Valley Pipe Line Company

Affiliated Companies

Dixie Pipeline Company
Explorer Pipeline Company
Locap, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

O. **SHELL POLYMERS AND CATALYSTS ENTERPRISES INC.**

Subsidiary Companies

Ardyne Inc.
CRI Ventures, Inc.
Morrison Molded Fiber Glass Company
Premix/Ems Inc.
Quazite Corporation
Rampart Packaging Inc.
Xerkon Inc.

P. **MORRISON MOLDED FIBER GLASS COMPANY**

Subsidiary Companies

AFC, Inc.
Glastrusions, Inc.
Glass-Steel, Inc.

Q. **SCALLOP COAL CORPORATION**

Subsidiary Companies

Justin Coal Corporation
Marrowbone Development Company
Wolf Creek Collieries Company
Shell Coal and Terminal Company

R. **BILLITON METALS INC.**

Subsidiary Company

Billiton Commodities Inc.

S. **SCALLOP CORPORATION**

Subsidiary Companies

AP Shipping Corporation
Argus Realty Services Inc.
Asiatic Petroleum Corporation
Greater New York Terminal, Inc.
Houston Fuel Oil Terminal, Inc.
Nickerson American Plant Breeders Inc.
Royal Lubricants Company, Inc.
Scallop Liquified Natural Gas, Inc.

T. **MARROWBONE DEVELOPMENT COMPANY**

Subsidiary Company

Big Beaver Coal Company

U. **SHELL COAL AND TERMINAL COMPANY**

Subsidiary Companies

Clipper Coal Corporation
Comcoal Corporation
East Kentucky Energy Corporation
Kermit Coal Company
Pike County Coal Corporation
Redbone Coal Company, Inc.
Shipyard River Coal Terminal Company
SLT Corporation
Sunset Coal Corporation
Tug River Mining Group, Inc.

V. **SHIPYARD RIVER COAL TERMINAL COMPANY**

Subsidiary Company

Cooper River Coal Terminal Company

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IN THE

Supreme Court of the United States

October Term, 1987

SHELL OIL COMPANY,
Petitioner,
vs.
CITY OF SANTA MONICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner Shell Oil Company, a corporation, most respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceedings on October 21, 1987.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 830 F.2d 1052 (9th Cir. 1987) and is reprinted as Appendix A hereto; the Ninth Circuit's order denying rehearing is reprinted as Appendix C.

The Memorandum of Decision and Order of the United States District Court for the Central District of California (Honorable Robert J. Kelleher, D.J.) has not been reported. It is reprinted as Appendix B hereto; the district court's judgment is reprinted as Appendix D.

JURISDICTION

The Court of Appeals for the Ninth Circuit's judgment was entered on October 21, 1987 affirming that portion of the district court's decision dated June 13, 1986, which is the subject of this petition. On January 11, 1988, the court of appeals denied a timely petition for rehearing and rejected petitioner's suggestion of the appropriateness of a rehearing in banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

There are two provisions of the United States Constitution which are relevant to the issues raised in this case. They are:

1. The Commerce Clause, art. I., § 8, cl. 3:

   "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . ."

2. The Supremecy Clause, art. VI, § 2:

   "This Constitution . . . shall be the supreme Law of the Land . . . ."

STATEMENT OF THE CASE

A. Jurisdiction In The District Court:

Jurisdiction in the district court was based on both diversity of citizenship (28 U.S.C. § 1332) and on the court's federal question jurisdiction (28 U.S.C. § 1331) based on an actual controversy between the parties relating to the interpretation of the Commerce Clause, art. I, § 8, cl.

3 of the United States Constitution, as well as the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. C.R.1.

B. Facts and Procedural Posture:

For more than 40 years, Shell Oil Company and its predecessor corporations have owned and operated a 10-inch diameter crude oil pipeline which receives crude oil traveling in interstate commerce and transports that oil from Ventura County, California to Shell's Wilmington Refinery located in Los Angeles County, California and to at least one non-Shell owned refinery in Southern California. C.R. 1:2, 2:2, 80:44. The total length of the pipeline is approximately 82.2 miles. C.R. 1:2, 2:2.

For approximately 3.9 miles, the pipeline passes through the City of Santa Monica, within the public streets. C.R. 1:2, 2:2. The City of Santa Monica does not own the streets in fee but instead only holds an easement for street purposes. C.R. 80:52. The streets through which the pipeline runs are lined with homes, apartments, businesses and light industry. C.R. 78:78.

Permission to locate and operate the pipeline within public streets in Santa Monica was originally granted to Shell's predecessor corporation by the City in a franchise dated May 28, 1941. C.R. 1:3, 2:2. The franchise expired May 28, 1981. C.R. 1:3, 2:2. Since that time, the pipeline has been operated under a temporary interim franchise as discussed in more detail below.

Although at one time the pipeline transported approximately 23,700 barrels of crude oil per day (C.R. 1:3, C.R. 77:39), in the last quarter of 1985 the pipeline transported approximately 32,862 barrels of crude oil per day, approximately 89% of which was delivered to Shell's Wilmington Refinery. C.R. 80:43-44. Approximately forty-

five percent of the oil presently carried by the pipeline comes from federal leases on the Outer Continental Shelf outside the State of California. The balance of the oil carried by the pipeline is produced in California. C.R. 80:44.

The Shell Wilmington Refinery manufactures the crude oil it receives from the pipeline into transportation fuels and other products, some of which are consumed in California and some of which are consumed outside California. C.R. 80:39, 41-42.

In the event that the flow of oil from the pipeline were cut off, Shell would do its best to find alternative supplies, but there is no reliable alternative supply of oil currently available to the company. C.R. 80:45-47. In the event Shell is required to relocate the line outside the City, it would cost approximately $2,500,000, plus right of way acquisition costs. C.R. 80:66. If Shell tried to replace the current throughput of the pipeline with trucks, approximately 170 tanker trucks per day would have to travel the surface roads between Ventura and Wilmington to transport the oil. This would result in a cost increase of approximately $1.36 per barrel. C.R. 80:45-46. Furthermore, shipping the oil from Ventura to Wilmington by barge or marine tanker is not feasible as a practical matter. C.R. 80:46-47. It is fair to conclude that not only would a shutdown of the pipeline adversely affect the commerce reflected by the Los Angeles area refineries' need for oil, but so would it adversely affect (a) the commerce reflected by refinery employees and subcontractors and by the distributors and consumers of refined products on the Wilmington end of the pipeline, as well as (b) the commerce reflected by the producers of oil and their employees and subcontractors at the Ventura end of the pipeline and (c) the commerce reflected by the sellers, distributors and users of the refined products outside of California.

The pipeline is not the only user of the subsurface of Santa Monica's streets. In 1981, the Southern California Gas Company paid the City $1,004.52 per mile of pipeline under its franchise for use of the public streets for gas distribution mains. Similarly, Southern California Edison Company paid $1,516.71 per mile for its use of the public streets for power lines. C.R. 80:54-55.

With the expiration of the 1941 franchise, negotiations were undertaken respecting a renewal franchise. An appraiser hired by the City to express an opinion of the reasonable value of the franchise through the streets for negotiating purposes determined that there was no relevant market for city streets because they were not normally bought and sold. He therefore valued the right of way with respect to the replacement cost of city streets using adjacent surface land values, concluding the value to be $474,000 per year with escalations in future years, assuming a ten-foot right of way. Shell's appraiser hired for the same purpose used a different appraisal method. He valued the right of way with respect to similar oil pipeline franchise fees paid to other cities. He concluded the value was approximately $10,000 per year. C.R. 78:80.

Ultimately the City proposed a franchise fee of approximately $237,000 per year predicated on the $474,000 per year value but assuming a five-foot right of way rather than a ten-foot right of way. C.R. 1:4, 2:3, 92:24-25, 78:80. In addition, the City demanded that the franchise include numerous detailed safety regulations. Shell proposed a franchise fee of $10,000 per year and argued that no safety regulations could be included because such regulations had been preempted on both the federal and state level by the federal Hazardous Liquid Pipeline Safety Act (49 U.S.C. §§ 2001-2014) and the California Pipeline Safety Act (Cal. Govt. Code §§ 5101, *et seq.*). C.R. 78:80.

The parties were unable to reach agreement. Shell then brought an action seeking a declaration that under the Commerce Clause of the United States Constitution and comparable provisions of the California Constitution, the City of Santa Monica may not require Shell to pay a renewal franchise fee for pipeline use of the public streets which is greater than an amount which would (a) reimburse the City for the cost of any services furnished by it in connection with the operation of the pipeline and (b) compensate the City for the reasonable value of any rights the City would surrender to Shell under the renewal franchise. Shell also sought a declaration that the franchise renewal fee demanded by the City is greater than the fee charged by other users of the subsurface of public streets and, therefore, constitutes unlawful discrimination under the Commerce Clause as well as the Equal Protection Clause of the United States Constitution and comparable provisions of the California Constitution. In addition, Shell sought a declaration that the renewal franchise could contain no safety regulations, the question of safety having been preempted at the federal and state levels. Lastly, Shell sought appropriate injunctive relief. The City answered denying Shell's allegations. C.R. 1:1-13, C.R. 2:1-6.

The City and Shell each filed cross motions for summary judgment regarding the validity of the franchise fee.[1] The City contended that the Commerce Clause did not apply to the proposed franchise fee primarily because the City acts as a "market participant" immune from Commerce Clause scrutiny when it sets such fees. Shell asserted that the City was not immune from Commerce Clause scrutiny and that the proposed fee was invalid because the fee exceeded the

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[1] The cross motions also raised the validity of the safety regulations but those issues are not involved in this Petition.

constitutional limitations on such user fees and discriminated against interstate commerce.

In its Statement of Genuine Issues of Facts filed in the district court on February 8, 1986 (C.R. 79, reprinted as Appendix E hereto), Shell stated that only one genuine issue of fact remained for trial:

> "What is the maximum amount of a fee which would (a) reimburse the City of Santa Monica for the cost of any services furnished by it in connection with the operation of the pipeline, and (b) compensate the City for the reasonable value of any rights the City would surrender to Shell under the renewal franchise?"

In its Statement of Genuine Issues of Material Fact dated March 24, 1986, the City of Santa Monica contended that under its theory of the case, there were no genuine issues of material fact to be tried but then proceeded to submit a number of alleged genuine issues of material fact remaining to be tried in the event the City's theory of the case did not prevail. C.R. 88, reprinted as Appendix F hereto. Among those genuine issues of fact is the following:

> "What amount reflects the fair market value of the subject right-of-way."

As to the franchise fee issue, the district court did adopt the City of Santa Monica's theory of the case and entered summary judgment in favor of the City.[2] The district court held that the City is a market participant, immune from Commerce Clause scrutiny and may refuse to deal with Shell on pipeline franchises. Because it can refuse to deal with Shell, the City may, as an alternative, charge Shell

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[2] On the safety regulations, the district court adopted Shell's theory of the case and concluded that safety had been preempted and thus the franchise could contain no safety regulations.

whatever the City wishes. In addition, the court held that the proposed franchise fee was not a "user fee" and, thus, *Western Oil and Gas Association v. Cory,* 726 F.2d 1340, 1342 (9th Cir. 1984) aff'd. *per curiam* by equally divided Court, 471 U.S. 81, 85 L.Ed.2d 61, 105 S.Ct. 1859 (1985) does not apply. Instead, the district court concluded the fee was a "tax" and was valid under the authority of *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981).

By accepting the City's theory of the case, the district court never reached the question of the reasonable value of the City streets or the value of the right of way. Those, of course, are issues which both the City of Santa Monica and Shell Oil Company had identified as issues to be tried if the City's theory of the case was rejected. There never was any evidence introduced on the value issue other than a declaration by the Santa Monica City Manager describing the course of negotiations between the parties which included a brief recital of the respective positions taken by the City's appraiser and Shell's appraiser (C.R. 78:80) and the City's Proposed Statement of Uncontroverted Facts, in which the City conceded as follows:

> "16. During the renewal negotiations, each party obtained . . . an appraisal of the value of the right of way from its own appraiser.
>
> "17. The parties' appraisers applied different valuation theories, and they reached disparate conclusions as to the value of the right of way." C.R. 77:39.

There was no evidence offered that the value of adjacent surface land values (which, of course, are values for buildable or built-upon lands) are comparable to the values of lands in the city streets (which, of course, are values for restricted and thus nonbuildable lands). Similarly, there was

never any trial whatsoever on the valuation issue. Counsel for the City will certainly confirm these facts if asked.

The petitioner then took a timely appeal to the Ninth Circuit from that portion of the district court's judgment which granted the City's motion for summary judgment on the fee issue.[3]

The case was argued and submitted on May 5, 1987. On October 21, 1987, the court filed its opinion authored by Circuit Judge Nelson, joined in by Circuit Judge Pregerson and accompanied by a separate concurring opinion by Circuit Judge Wiggins. The opinion is reported as *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987). Although the Ninth Circuit *rejected* the City's theory of the case on the user fee issue, it nevertheless affirmed the trial court's summary judgment.

The majority opinion first considered whether the franchise fee was subject to Commerce Clause scrutiny. In doing so, the court necessarily addressed the "market participant" doctrine relied upon by the district court and concluded the rules stated in its decision in *Western Oil and Gas Association v. Cory*, 726 F.2d 1340 (9th Cir. 1984) aff'd. *per curiam* by an equally divided Court, 471 U.S. 81 (1985) were applicable. The Ninth Circuit reasoned that although the State of California in *Cory* had a stronger monopoly position with respect to pipeline routes over State tidelands than the City of Santa Monica has with respect to pipeline routes through city streets, nevertheless the lands in question are held by the City of Santa Monica in its sovereign capacity and are recognized transportation corridors for commerce. Because restrictions on publicly controlled transportation corridors raise the dormant

[3] Similarly, the City of Santa Monica took an appeal to the Ninth Circuit from that portion of the judgment granting Shell's motion for summary judgment on the safety regulation issue.

Commerce Clause concerns for impediments to the free flow of commerce, the City of Santa Monica was *not* a "market participant" with respect to those publicly controlled transportation corridors.[4]

Having concluded that the City's franchise fee was subject to Commerce Clause scrutiny, the Ninth Circuit then turned its attention to whether the proposed franchise fee violated the Commerce Clause. First, the Ninth Circuit dismissed Shell's argument that the franchise fee discriminated against interstate commerce. The court reasoned that because Shell is the only *oil* pipeline which passes through the City of Santa Monica, the City did not and, indeed, could not have treated any local oil pipeline operator preferentially to Shell. The court concluded that any discrimination in favor of local natural gas pipelines and local electrical lines could not be considered. On that basis, the court concluded that, as a matter of law, there could be no discrimination against interstate commerce.[5]

Next, the Ninth Circuit agreed with Shell's characterization of the proposed franchise fee as a "user fee" or "rent" as opposed to a "tax." It acknowledged that traditionally user fees have only been upheld if they bear a reasonable relationship to the value of the benefits conferred by the governmental entity. The Ninth Circuit then purported to

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[4] The court carefully restricted its opinion to lands held in the City's sovereign capacity and expressed no opinion on lands that the City might hold in other capacities.

[5] The court also noted that there might be perfectly justifiable reasons for any discrimination such as differing safety considerations and differing property value levels at the time of franchising which could explain the difference in franchise fees. 830 F.2d at 1058-1059, n.7. This is, of course, a factual issue upon which no trial was ever held and on which no factual findings were made by the district court. Indeed, the only evidence in the record suggests that oil pipelines are safer than gas pipelines. C.R. 80:71-73.

apply this user fee test to the decision reached by the district court. The court of appeals apparently concluded that the district court had found the franchise fee to be a reasonable sum not disproportionate to the benefits conferred.[6] On that basis, the Ninth Circuit affirmed. At page 100 of 830 F.2d., the court declared as follows:

> ". . . We agree with the district court that *Cory's* user fee analysis does not require invalidation of the proposed franchise fee because the fee was valued according to a reasonable percentage of the appraised value of land abutting the pipeline within the city. Because Santa Monica's fee is based on an evenhanded formula and not graduated by the amount of business done, it is not a 'customs duty' on goods passing through its jurisdiction like the volumetric charge held invalid in *Cory*. Shell does not dispute Santa Monica's contention that the proposed franchise fee was based on an appraisal of 50% of the property value of the abutting land, capitalized at an annual rate of 12.5%.
>
> "As in *Cory*, we are unable to conclude that this valuation is ' "manifestly disproportionate to the services rendered." ' *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 & n.12, 101 S.Ct. 2946, 2955-56 and n. 12, 69 L.Ed. 2d 884 (1981) (quoting *Clark*, 306 U.S. at 599, 59 S.Ct. at 753). We conclude that Shell has not met its burden at summary judgment of showing that Santa Monica has discriminated against interstate commerce.

[6] To this extent, Shell contends the court of appeals was under a serious misapprehension of fact. No such finding was ever made by the trial court.

> Accordingly, we affirm the district court's grant of summary judgment."

In a concurring opinion, Judge Wiggins concluded that while the City of Santa Monica's franchise fee was an "ominous form of overreaching" the result of which would be a "Balkanization" of the economy, there was nothing the courts could do to meet the danger. It must be left to Congress to lift "the resultant burden to commerce." 830 F.2d at 1066-1067. Judge Wiggins' words are as follows:

> "This case is narrow in its reasoning, as it should be. But it also sounds a clarion call to Congress for action. It is true that Congress has not prevented the disruption of interstate traffic in petroleum products which Santa Monica's imposition of rent, if it were emulated by every municipality on the pipeline's course, presents. The only check on this ominous form of overreaching by local authorities against politically unpopular enterprises, such as oil producers, is the vague notion of proportionality of rent to services provided by the city. Santa Monica did not, I agree, cross the line in this case. But I do have my doubts whether this decision addresses an invitation to like-situated localities in California (or Nevada and Alaska, for that matter), to press the limits of proportionality, and enter the realm of confiscation. Besides increasing prices to consumers of gasoline, the result of all this will be the 'Balkanization' of the economy. This is more than a quaint and picturesque phrase describing a hypothetical danger. The Supreme Court intended it as a warning to deter the states from interfering in the national economy. *Hughes v. Oklahoma,* 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1730-31, 60 L.Ed.2d 250 (1979). The danger of

> exorbitant rents on oil pipeline traffic and the resultant burden to commerce cannot be met in this court; it must be answered by Congress."

In addition, the Ninth Circuit reversed that portion of the trial court's decision holding that the question of preemption of safety regulations under the Federal Hazardous Liquid Pipeline Safety Act depended upon factual issues which must be determined at trial. The court then remanded for further proceedings. That ruling by the court is not at issue in this petition for writ of certiorari.

On November 4, 1987, Shell filed a Petition for Rehearing and Suggestion of Appropriateness of Rehearing In Banc. The Petition argued that the court was under a misapprehension of fact, believing that the trial court had made a finding that the $59,000 per mile fee was reasonable when, in fact, the trial court had made no such finding. Furthermore, Shell argued, even if the trial court had wanted to make such a finding, it could not properly have done so without a trial on the merits. On January 11, 1988, the Ninth Circuit denied the Petition for Rehearing and rejected the suggestion for rehearing in banc without comment (Appendix C).

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Decision Conflicts With Decisions Of This Court And Another Federal Court Of Appeals Because It Approves User Fees Based On Values Of Land Abutting The Right Of Way Rather Than The Cost To The City Of Services Furnished Or The Market Value Of The Right Of Way.

The Ninth Circuit's decision in this case is in conflict with *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. __, 97 L.Ed.2d 226, 107 S.Ct. 2829 (1987); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-622, 69 L.Ed.2d 884, 897, 101 S.Ct. 2946 (1981) and cases cited therein. As this Court explained in the *Commonwealth Edison* case, "user fees" or "user taxes" that are designed as specific charges imposed for the use of state owned or state provided transportation facilities cannot be tested by standards which generally determine the validity of "general revenue taxes." Such user fees imposed on interstate commerce can only be upheld if they do not appear to be manifestly disproporationate to the benefits conferred. In other words, they can only be upheld if they are reasonably calculated to reimburse the state for the cost of any services furnished and/or compensate the state for the reasonable value of the use of the state owned or state provided transportation facility. In so stating, this Court cited *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 31 L.Ed.2d 620, 92 S.Ct. 1349 (1972); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 83 L.Ed. 1001, 59 S.Ct. 744 (1939); and *Ingels v. Morf*, 300 U.S. 290, 81 L.Ed. 653, 57 S.Ct. 439 (1937). More recently,

in the *American Trucking Associations* case, this Court reviewed the *Commonwealth Edison* case, *supra,* and the *Evansville-Vanderburgh Airport Authority* case, *supra,* and once again emphasized that such user fees or user taxes must be based on a fair approximation of the cost or value of the use of the facilities in question. 97 L.Ed.2d at 247, 107 S.Ct. at 2843-2844.

Here, in contrast to the above authorities, the Ninth Circuit has approved a street user fee which is not measured by either the value of the city streets or the value of any services furnished by the City. Instead, it is measured entirely by something irrelevant — the value of privately owned lands abutting the streets. The Ninth Circuit did so in the absence of any evidence whatsoever in the record that the value of the city streets and the value of the privately owned lands abutting the city streets are in any way comparable. Indeed, common sense indicates that they are not comparable. The record below demonstrates that the lands abutting the streets are either already built upon or are buildable, whereas the lands in the streets are restricted and cannot be built upon at all.

The Ninth Circuit's decision also conflicts with a decision of the Eleventh Circuit. In *Arrow Airways, Inc. v. Dade County,* 749 F.2d 1489, 1491-1493 (11th Cir. 1985), that court considered a Commerce Clause challenge to rents and fees charged to tenants at Miami International Airport. The Eleventh Circuit applied the *Evansville-Vanderburgh Airport Authority* case, *supra,* and found that the rents and fees were reasonable because, *inter alia,* the rents charged at the airport were 75 to 80 percent of the market level of rents charged for *similar property* in the areas surrounding the airport. Here, in contrast to *Arrow Airways, Inc.,* the Ninth Circuit has approved a street user fee which is not shown to be at all comparable to rentals or fees charged for other similar properties. Indeed, the only evidence on fees

charged for other oil pipelines in city streets elsewhere would indicate a $10,000 per year franchise; *i.e.*, $2,564 per mile per year, rather than the $59,000 per mile per year demanded by the City. Similarly, comparison to the natural gas pipeline franchise in Santa Monica would suggest a yearly fee of approximately $1,000 per mile.

Even if one were to assume for sake of argument that the franchise fee should be evaluated as though it were a general revenue tax rather than a "user fee" or "user tax," the Ninth Circuit decision in the instant case would also be directly in conflict with the *Commonwealth Edison Co.* case, *supra.* In *Commonwealth Edison,* this Court, reviewing a general revenue tax, applied the four-part test of *Complete Auto Transit v. Brady,* 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977). At page 617 of 453 U.S., this Court explained that under *Complete Auto Transit's* four-part test, a state tax does not offend the Commerce Clause if it (1) is applied to an activity with a substantial nexus with the taxing jurisdiction, (2) is fairly apportioned, (3) does not discriminate against interstate commerce and (4) is fairly related to services provided by the taxing jurisdiction. At page 626 of 453 U.S., the *Commonwealth Edison* case teaches that the fourth prong of the *Complete Auto Transit* test, at least in the context of general revenue taxes, merely means that the measure of the tax must be reasonably related to the extent of the taxpayer's contact with the taxing jurisdiction. *Commonwealth Edison* explains that this is because it is the presence of the taxpayer in the jurisdiction that justifies the taxpayer's being required to bear a just share of the tax burden.

Here, the Ninth Circuit decision is in conflict for two reasons. First, as we discuss hereafter (See heading II), the franchise fee demanded by the City of Santa Monica does discriminate against interstate commerce. Second, the Ninth Circuit decision conflicts with the fourth prong of

the *Complete Auto Transit* test in that the measure of the franchise fee is not in any way reasonably related to the extent of the pipeline's contact with the City. The franchise fee is imposed as if the pipeline passed through the lands abutting the city streets. It does not. It passes through the city streets themselves. For the measure of the franchise fee to be reasonably related to the pipeline's contact with the City, it must be measured by the City's costs and/or the value of the city streets.

Pipelines simply cannot pass through heavily urbanized areas without utilizing public streets. Recognizing that the free flow of commerce was vital to the economic survival of the United States, the framers of the Constitution created the Commerce Clause. This Court, recognizing that the free flow of commerce would be impaired if state and local governments were allowed to overreach in the desire to maximize revenues from interstate commerce, has imposed limits on user fees. The Court has limited such fees to the value of the benefits conferred — in other words, it has limited them to the value of any services furnished plus the value of the property utilized. In addition, this Court has also limited general revenue taxes to those which, among other things, are reasonably related to the contact that the instrument of commerce has with the taxing jurisdiction. The Ninth Circuit's decision in the instant case casts aside those protections and allows overreaching. It allows a strategically located city to extract a tribute from a pipeline carrying oil in interstate commerce, which tribute is far in excess of the value of any benefits conferred and which is totally unrelated to the pipeline's contact with the City. Therefore, whether the franchise fee is analyzed as a "user fee" or as a "general revenue tax," the Ninth Circuit decision is in conflict with decisions of this Court and another federal Court of Appeals.

II.

The Ninth Circuit's Conclusion That The Commerce Clause Does Not Prohibit Discrimination Against A Pipeline Carrying Oil In Interstate Commerce Unless The Discrimination Is In Favor Of A Local Pipeline Carrying Oil (And Not In Favor Of A Local Pipeline Carrying Natural Gas) Raises Important And Unresolved Questions Of Federal Constitutional Law.

The Ninth Circuit concluded in this case that because there were no local *oil* pipelines and, indeed, the Shell Oil Company pipeline was the *only oil* pipeline in the entire City, there was no basis for Shell's contention that the franchise fee demanded by the City discriminated against interstate commerce and in favor of local commerce. The Ninth Circuit decision dismisses as legally irrelevant the fact that the franchise fee demanded by the City is some 59 times greater than the franchise fee charged the local gas company for the same pipeline use of the streets to deliver natural gas to local inhabitants, or the franchise fee charged the local electrical utility for the same use of the city streets to deliver electricity to local inhabitants. Apparently, the Ninth Circuit would only allow a trial on the fact of discrimination to go forward if the Shell Oil Company pipeline were being charged 59 times more per mile than some local *oil* pipeline.

Although there are numerous cases decided by this Court holding that discrimination against interstate commerce will not be tolerated, *e.g., American Trucking Associations, Inc., supra,* 97 L.Ed.2d at 246-248, 107 S.Ct. at 2843-2844; *Maryland v. Louisiana,* 451 U.S. 725, 753-760, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981), we have been able to find no case discussing the type of conduct sanctioned by the Ninth

Circuit in this case. We submit that the Ninth Circuit's decision on this point sanctions a particularly invidious form of discrimination. It allows a city to charge interstate commerce in one commodity a very high franchise fee so that local commerce in a different commodity can be subsidized, even though both the interstate commerce and the local commerce make the same use of the streets.

Local commerce is protected from excessive fees by the political process. Obviously, if excessive fees were extracted from local utilities, those fees would eventually show up in the billing sent by the local utilities to the local citizenry and there would be a political outcry. On the other hand, the City can safely charge interstate commerce a very high fee without fear of political repercussions from the local citizenry. The political process thus offers no protection from this type of discrimination. Only the Constitution, as interpreted and enforced by the courts, can prevent it.

From the standpoint of guaranteeing the free flow of commerce, it should make no difference that the interstate commerce, which is being asked to subsidize local commerce, involves a different commodity. The use of the streets by the local commerce is the same as the use of the streets by the interstate commerce. Therefore, there is still discrimination. This is exactly the sort of thing the Commerce Clause was designed to prevent. The Ninth Circuit's decision thus raises an important and unresolved question of federal constitutional law which should be decided by this Court.

III.

The Ninth Circuit's Approval Of A Summary Judgment Upholding User Fees For City Streets Based Entirely On The Value Of Privately Owned Lands Abutting The Streets In The Absence Of Evidence That Buildable Lands Abutting The Streets Are Comparable In Value To Nonbuildable Lands In The Streets, So Far Departs From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

Supreme Court Rule 17.1 permits review on certiorari where a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings that the Supreme Court deems it necessary to exercise its power of supervision over the lower federal courts. This case presents a situation where the Court should exercise that supervisory power.

The Ninth Circuit, in upholding the district court's grant of summary judgment on the franchise fee issue, violated one of the most basic of rules. Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment may not be granted where there is a genuine issue of material fact remaining to be tried. Here, the court of appeals affirmed the district court's decision in spite of the presence of a genuine issue of material fact disclosed by the record below. Not only was the existence of this issue of material fact disclosed by the record, but the existence was conceded by *both* parties in the trial court.

As set forth above in Petitioner's Statement of the Case, Shell's Statement of Genuine Issues of Facts filed in the district court on February 8, 1986 (reprinted as Appendix E) stated that a genuine issue of fact remained for trial:

"What is the maximum amount of a fee which would (a) reimburse the City of Santa Monica for the cost of any services furnished by it in connection with the operation of the pipeline, and (b) compensate the City for the reasonable value of any rights the City would surrender to Shell under the renewal franchise?"

In its Statement of Genuine Issues of Material Fact dated March 24, 1986 (reprinted as Appendix F), the City of Santa Monica contended that under its theory of the case, there were *no* genuine issues of material fact to be tried, but then proceeded to submit a number of alleged genuine issues of material fact remaining to be tried in the event the City's theory of the case *did not* prevail. Among those genuine issues of fact is the following:

"What amount reflects the fair market value of the subject right-of-way."

As to the franchise fee issue, the district court *did adopt* the City of Santa Monica's theory of the case and, therefore, *never reached this genuine issue of material fact.* The Ninth Circuit, however, rejected the City's theory of the case. This revived the genuine issue of material fact relative to valuation and, therefore, the Ninth Circuit should have remanded the case for further proceedings on this issue.

There is clearly a conflict in the evidence on this issue of material fact. As already demonstrated, a declaration filed in the district court by the City of Santa Monica, as well as the City's own Proposed Statement of Uncontraverted Facts demonstrate that the opinions of the City's appraiser and Shell's appraiser as to the reasonable value of the franchise differ dramatically. Further, the City's appraiser valued the franchise in relation to the value of lands abutting the streets, but the City failed to provide any

evidence showing the value of the lands abutting the city streets was comparable or in any way similar to the value of lands in the city streets. In fact, the record is devoid of any evidence demonstrating such comparability or similarity. On these facts, the appellate court's affirmance of the summary judgment originally entered in the trial court on other grounds was inappropriate as a matter of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-161, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970); *United States v. Diebold*, 369 U.S. 654, 655, 8 L.Ed.2d 176, 82 S.Ct. 993 (1962).

The existence of this factual conflict in the evidence was brought to the attention of the court of appeals in Shell's petition for rehearing. Nevertheless, the Ninth Circuit denied Shell's petition for rehearing.

Summary judgment should never be granted in cases where there is a genuine dispute over issues of material fact. This is particularly true in cases involving important questions of constitutional law. 6 J. Moore & J. Wicker, *Moore's Federal Practice*, § 56.17[10] (1987); 10 A. C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2732.2 (1983). For that reason, Shell respectfully submits that this is an appropriate case for this Court to exercise its supervisory powers and order that the case be remanded to the district court for further proceedings relating to the reasonable value of the benefits conferred by the franchise.

CONCLUSION

For all of the above-stated reasons, petitioner respectfully requests that the Court grant the Petition as prayed.

Dated: April 9, 1988

Respectfully submitted,

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APPENDIX A

SHELL OIL COMPANY, a Delaware Corp.
Plaintiff-Appellant-Cross-Appellee,
vs.

CITY OF SANTA MONICA, a municipal corp.,
Defendant-Appellee-Cross-Appellant.

Nos. 86-6103, 86-6206

United States Court of Appeals,
Ninth Circuit

Argued and Submitted May 5, 1987.
Decided October 21, 1987.

830 F.2d 1052

Edward S. Renwick, Los Angeles, Cal., for plaintiff-appellant-cross-appellee.

Mary H. Strobel, Santa Monica, Cal., for defendant-appellee-cross-appellant.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON, NELSON and WIGGINS, Circuit Judges.

NELSON, Circuit Judge:

Shell Oil Company appeals from a grant of summary judgment holding (1) that the City of Santa Monica is exempt from the dormant commerce clause under the market participant doctrine in its setting of a franchise fee for an oil pipeline traversing the city and (2) that the state constitution does not bar the fee. Santa Monica cross-appeals from a grant of summary judgment holding that the Hazardous Liquid Pipeline Safety Act, 49 U.S.C.A. §§

2001-2014 (Supp. 1987), preempts Santa Monica from imposing any safety standards in an intrastate pipeline franchise agreement. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982). We affirm in part and vacate and remand in part.

BACKGROUND

In 1941, the City of Santa Monica and a predecessor of Shell Oil Company entered into a forty-year franchise agreement to operate an oil pipeline underneath city streets. Santa Monica does not hold a fee interest in the streets; it holds an easement in the streets for street purposes. The 1941 franchise granted Shell's predecessor an exclusive subsurface easement in, under, along, and across certain public streets. It provided that the grantee would comply with all ordinances, rules, or regulations then or thereafter adopted by the Santa Monica City Council. The franchise did not include any provision for renewal. Today, Shell owns, operates, and maintains the pipeline.

The entire pipeline traverses 82.2 miles from Ventura County, California, to Shell's Wilmington refinery in Los Angeles County, California. The portion within Santa Monica totals 3.9 miles. The ten-inch diameter pipe enters the northeast corner of the city and runs roughly north to south, parallel to the coast, a few blocks inside Santa Monica's eastern boundary with the City of Los Angeles. For the most part, the pipe lies approximately forty-eight inches below the surface of the street. It runs within some fifty feet of the city's water well #6, passes by the San Vicente reservoir, intersects several storm drains flowing west to the sea, and crosses over the Santa Monica Freeway (Interstate 10). The area the pipe traverses is heavily residential and commercial. Under the franchise agreement, Shell paid Santa Monica a total annual fee of $1,029.60,

based on a formula of \$.005 per inch internal diameter per linear foot of pipe.

As of 1985 and early 1986, the Ventura pipeline carried in excess of 32,000 barrels of crude oil per day. All of Shell's drilling sites are onshore in California. Pursuant to "exchange agreements," however, Shell also acquires title to oil drilled by other oil companies on the outer continental shelf and transmits the combined oil through the pipeline. Shell thus holds title to all of the oil while in the pipeline. Approximately 89% of the pipeline's oil is then delivered to Shell's Wilmington refinery, accounting for 24% of the refinery's input. Some of the fuel produced at the refinery is delivered to suppliers in Nevada and Arizona. The remaining 11% of the crude oil carried in the pipeline is distributed to the other oil companies from whom Shell acquired title under the exchange agreements.[1]

Prior to the expiration of the agreement in 1981, Santa Monica and Shell commenced negotiations for a new franchise agreement. In May 1981, Shell proposed an annual fee of \$8,514.51, which Santa Monica rejected. After commissioning a firm to appraise the fair rental value of the route, Santa Monica proposed a flat fee of \$237,000 per year (with inflation escalators). This amount was based on a five-foot wide subsurface right of way valued at a rate corresponding to 50% of the abutting surface land value, assessed at an annual 12.5% rate of return. Shell countered with a figure of \$10,000 to \$12,500 per year, based on its own firm's appraisal of pipeline franchise fees, with numerous other California cities.[2]

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[1] Shell does not claim that it is a common carrier or public utility that would be both subject to PUC regulation and vested with the power of eminent domain. *See* Cal.Pub.Util.Code §§ 610, 615 & comments, 211, 216, 228 (West 1975 & Supp.1987).

[2] Santa Monica alleged that nearly all of these cities were general law

The parties also disagreed over the inclusion of safety standards in the proposed franchise agreement. The engineering firm retained by Santa Monica noted three prior ruptures in the Ventura pipeline, resulting in spills of 4,337 barrels of crude oil, and analyzed the risks and consequences of future ruptures. *See* NDE Technology, Inc., *Safety Study for the Section of the Shell Oil Ventura 10-inch Crude Pipeline* (November 1981). In view of the age of the pipeline, its special physical characteristics,[3] and the high density residential and commercial areas it traverses, the NDE report recommended numerous safety improvements, which Santa Monica proposed to include in the franchise agreement. The firm retained by Shell to conduct a safety analysis, while acknowledging the possibility of accidents, emphasized the safety record of the Ventura pipeline, disputed some aspects of the NDE report, and generally presented a more optimistic view of the potential risks. *See* Bechtel Petroleum, Inc., *Santa Monica Segment Shell Ventura Crude Oil Pipeline* (February 1982). Shell objected to the inclusion of any safety standards in the franchise.

To date, the parties have not signed a new franchise agreement. Interim agreements have allowed Shell to continue to use the substreet easement, apparently at a fee of approximately $10,000 or $11,000 per year.

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cities subject to a franchise fee formula under the California Public Utilities Code § 6231 (West Supp. 1987). Santa Monica is a charter city, *see Pines v. City of Santa Monica*, 29 Cal.3d 656, 630 P. 2d 521, 175 Cal.Rptr. 336 (1981), which it asserts is not required to apply the PUC formula.

[3] The study emphasized the 1600-foot vertical drop in the pipeline just north of the city boundary, which would increase both the pipeline pressure within Santa Monica and the volume of oil spilled in the event of a rupture.

On May 14, 1982, two days prior to the expiration of one of the interim agreements, Shell filed a complaint in federal district court. Shell sought declarations that (1) the proposed fee would unreasonably burden interstate commerce in violation of the commerce clause; (2) Santa Monica may impose only a fee that does not exceed the costs of any city services provided in connection with the pipeline and the reasonable value of the property rights surrendered to Shell in the franchise; (3) the fee violates the California Constitution; (4) Santa Monica violated the federal and state equal protection clauses by discriminating between Shell and other grantees of substreet easements; and (5) federal and state law preempt Santa Monica's attempt to impose any safety standards on the pipeline. Shell also sought permanent injunctive relief, *inter alia*, that Santa Monica (1) may not prevent Shell from transporting crude oil in the pipeline or otherwise interfere "with Shell's right to transport crude oil by pipeline through the City"; (2) may impose a fee based only on the reimbursement/compensation costs described above; and (3) may not impose any pipeline safety standards.

On June 12, 1986, the district court granted summary judgment in favor of Santa Monica in part and in favor of Shell in part. On the commerce clause issues, the court principally held that Santa Monica is a market participant in the area of oil transportation and thus is not subject to commerce clause restrictions. Second, the court held that the California Constitution did not bar the proposed fee. Finally, the court held that federal law preempts Santa Monica's attempt to impose any safety standards. Both parties filed timely appeals.

STANDARD OF REVIEW

This court reviews de novo a grant of summary judgment and any determinations of federal and state law. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629-30 (9th Cir. 1987). We must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there remains no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law. *Id.* at 630.

DISCUSSION

I. *The Federal Commerce Clause Issues*

A. *The Market Participant Doctrine*

Shell's primary challenge is that the $237,000 annual fee violates the federal commerce clause because it places an unreasonable burden on interstate commerce. By its own terms, the commerce clause grants Congress power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, §8, cl. 3. The present case does not involve an affirmative exercise of that power by Congress insofar as the route of the pipeline or the amount of the fee is concerned.[4] However, even in the absence of affirmative congressional action, the commerce clause prohibits states from taking certain action respecting interstate commerce.

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[4] *See* 49 U.S.C.App. §2001(4) (1982) (expressly providing that the Secretary of Transportation does not have authority to prescribe the location or routing of any oil pipeline facility); 49 U.S.C.A. § 1682a (Supp. 1987) (authorizing the Secretary of Transportation to establish pipeline safety user fee schedule for regulatory and enforcement activity under the Hazardous Liquid Pipeline Safety Act, but saying nothing on easement fees).

CTS Corp. v. Dynamics Corp. of Am., — U.S. — , 107 S.Ct. 1637, 1648, 95 L.Ed.2d 67 (1987). The Court's interpretation of " 'these great silences of the Constitution,' " *id.* (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535, 69 S.Ct. 657, 663, 93 L.Ed. 865 (1949)), has sprung primarily from a concern to avoid the Balkanization of commerce among the states. *See Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979); *see also* Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1094-95 (1986) (arguing that the dormant commerce clause is concerned primarily with purposeful economic protectionism). Yet, as the Court itself recently stated, its dormant commerce clause jurisprudence "has not always been easy to follow." *CTS Corp.*, 107 S.Ct. at 1648.

In the present case, the district court granted Santa Monica's motion for summary judgment on the franchise fee question on the ground that Santa Monica acted as a "market participant" that is not subject to the restrictions of the dormant commerce clause. Under the Court's market participant doctrine, if a state or state subdivision acts as a market participant rather than as a market regulator, the commerce clause does not "'require independent justification'" for any protectionist practices. *White v. Massachusetts Counsel of Constr. Employers, Inc.*, 460 U.S. 204, 207, 103 S.Ct. 1042, 1044, 75 L.Ed.2d 1 (1983) (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809, 96 S.Ct. 2488, 2497, 49 L.Ed.2d 220 (1976)). However, the key distinction between "market regulator" and "market participant," *see, e.g., South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93, 104 S.Ct. 2237, 2243, 81 L.Ed 2d 71(1984) (plurality), though clearly defined in theory, has occasioned considerable dispute in application in the four principal Supreme Court cases. *See Hughes v.*

Alexandria Scrap Corp., 425 U.S. 794, 96 S.Ct. 2488, 2497, 49 L.Ed.2d 220 (1976) (6-3 decision by Powell; White in dissent); *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) (5-4 decision by Blackmun; Powell and White in dissent); *White*, 460 U.S. 204, 103 S.Ct. 1042 (7-2 decision by Rehnquist; Blackmun and White in dissent); *Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237 (4-2-2 decision by White, joined by Blackmun; Powell concurrence in result; Rehnquist dissent). For reasons discussed below, we hold that Santa Monica has not acted as a market participant for purposes of the dormant commerce clause.

This case falls somewhere between the paradigm examples of market regular and market participant. *Cf. Reeves*, 447 U.S. at 439 n. 12, 100 S.Ct. 2278, n. 12 ("When a State buys or sells, it has the attributes of both a political entity and a private business."). Santa Monica has not acted as a paradigm market regulator, as it would if it adopted an ordinance regulating the fees for all oil pipelines within the city. Santa Monica has independently negotiated a franchise agreement with Shell and has not prohibited private landowners in the city from selling easements to Shell. Hence, Santa Monica urges the position that it should be deemed a market participant because the franchise relationship with Shell is contractual. But contractual privity does not insulate a state or local body from commerce clause scrutiny. *Wunnicke*, 467 U.S. at 97, 104 S.Ct. at 2245 (holding that a state may not impose requirements with "a substantial regulatory effect outside of that particular market" merely because it can use its economic power to impose a requirement upon someone with whom it is in contractual privity); *see Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 106 S.Ct. 1395, 1400-01, 89 L.Ed. 2d 616 (1986); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 106 S.Ct. 1057, 1062-64, 89 L.Ed.2d 223 (1986).

Santa Monica argues that it has entered the particular market for the transportation of crude oil. The City controls easements in the area beneath city streets, a commodity with value that it may sell to Shell. The city thus competes with other entities that also might supply Shell's needs — private landowners in Santa Monica who may sell easements under their land, neighboring municipalities and private landowners, and tank truck and barge operators.

Although Santa Monica's argument is not without considerable intuitive appeal, this court has previously rejected a similar argument in a related context. In *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984), *aff'd per curiam by an equally divided Court*, 471 U.S. 81, 105 S.Ct. 1859, 85 L.Ed.2d 61 (1985), this court held that the State of California did not act as a market participant in its attempt to impose a fee for the transportation of crude oil from offshore oil rigs across state-owned tidal and submerged lands. The court reasoned that California did not participate in a "market" in the sense intended under the Supreme Court's dormant commerce clause jurisprudence because the state held the land by virtue of its sovereign capacity and the state commission had a virtual monopoly over the sale of easements on tidal and submerged lands. *Id.* at 1343. The court reached this conclusion even though alternatives arguably existed to the pipeline route over state lands, albeit with varying degrees of economic feasibility. In particular, the pipeline operators apparently could have sought a pipeline route over certain tidal lands that the state did not own, *see id.*, or transported the oil by barge. The court also observed: "This control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce." *Id.*

As the district court recognized, the present case is distinguishable from *Cory* insofar as California had a

stronger monopoly position than Santa Monica has. Shell concedes the existence of alternatives to a pipeline under Santa Monica streets. However, like *Cory*, this case involves lands held in a sovereign capacity that are recognized transportation corridors for commerce. As the court recognized in *Cory*, restrictions on publicly controlled transportation corridors raise the dormant commerce clause concern for impediments to the free flow of commerce. *See* Regan, *supra*, at 1184 (discussing "the special importance of an effective transportation network" to interstate commerce). We would find it untenable if a state or its subdivision could allocate rights to the use of publicly held transportation corridors in a manner that discriminated against interstate commerce in favor of intrastate commerce. *See West v. Kansas Natural Gas Co.*, 221 U.S. 229, 262, 31 S.Ct. 564, 574, 55 L.Ed. 716 (1911) (invalidating a state attempt to refuse to grant underground pipeline easements across state highways to foreign corporations, while granting similar easements to domestic corporations for intrastate transportation of the same commodity, when the apparent purpose was to limit export of natural gas produced in state).

We therefore conclude that, following *Cory*, Santa Monica is not a market participant in the setting of franchise fees for easements under public streets.[5] Santa

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[5] We are mindful of the fact that franchising is, as a general matter, a traditional governmental function and that members of the Court have indicated that the market participant doctrine rests in part on considerations of state sovereignty. *See Reeves*, 447 U.S. at 438-39, 100 S.Ct. at 2278 (Blackmun, J.); *accord White*, 460 U.S. at 207 n. 3, 103 S.Ct. at 1044 n. 3 (Rehnquist, J.). "It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere" of " 'integral operations in areas of traditional governmental functions.' " *Reeves*, 447 U.S. at 438 n. 10, 100 S.Ct. at 2278 n. 10. We believe, however, that Santa Monica has not

Monica contends that such a holding in effect would vest a private company with the power of eminent domain, or, alternatively, vest a private company with the power to dictate the terms on which it uses substreet property. We reject these contentions. Our holding that Santa Monica is not a market participant means only that in deciding whether, or on what terms, to grant a franchise for the use of public streets the city may not burden interstate commerce in a manner that violates the dormant commerce clause.[6]

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engaged in "marketplace conduct" within the meaning of the market participant exception and that the city's action with respect to transportation corridors is "the kind of action with which the Commerce Clause is concerned." *Alexandria Scrap,* 426 U.S. at 805, 90 S.Ct at 2495; *see also* Regan, *supra,* at 1198-99 n. 210 (arguing that *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.,* 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), "reveals that the estate-as-market-participant doctrine is *not* aptly regarded as a doctrine about 'state sovereignty' "); *cf. Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (Blackmun, J.) (overturning *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), and restricting scope of state sovereignty in the face of affirmative congressional action under the commerce clause).

We observe that this case involves only substreet easements controlled by the city in its sovereign capacity. *See Cory,* 726 F.2d 1343. We have no occasion to decide what restrictions, if any, the dormant commerce clause may place on the sale of property interests in land purchased or acquired by the city through its entry into the real estate market.

[6] Hence, we have no difficulty acknowledging the legitimacy of state laws that generally authorize a municipality to grant a franchise under public streets on such "terms and conditions . . . whether governmental or contractual in character, as in the judgment of the legislative body are to the public interest," *see* Cal.Pub.Util.Code § 6203 (West 1965), or that authorize a city to require that a nonpublic pipeline utility, " if granted the franchise, will pay to the municipality . . . an annual franchise fee in an amount agreed to by the applicant and the municipality," *see id.* § 6231 (West Supp. 1987). *See Sunset Tel. & Tel. Co. v. City of Pasadena,*

B. The Dormant Commerce Clause

Our conclusion that Santa Monica has not acted as a market participant does not end our inquiry. We must also determine whether the proposed franchise fee is invalid under a traditional dormant commerce clause analysis. At the outset, we note that this case does not involve either of the two primary objects with which the commerce clause is concerned — statutes that discriminate against interstate commerce and statutes that adversely affect interstate commerce by subjecting activities to inconsistent regulations. *CTS Corp.*, 107 S.Ct. at 1648-49; *id.* at 1652 (Scalia, J., concurring). First, Santa Monica has not acted to restrict the flow of goods or natural resources from being shipped into or outside of its boundaries in order to protect producers or suppliers within the city. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); *West*, 221 U.S. 229, 31 S.Ct. 564. Santa Monica has not acted to favor domestically produced crude oil over that produced outside of Santa Monica; none is produced in Santa Monica. In addition, Shell has not presented any evidence that Santa Monica has treated any local oil pipeline operators preferentially. The record shows that Shell is the only company operating an oil pipeline in Santa Monica.[7] The

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161 Cal. 265, 284, 118 P. 796, 804 (1911).

[7] Shell has presented evidence that Santa Monica has franchise agreements with two public utilities at lower fees than the fee proposed in its renewal agreement. Southern California Edison Company pays an annual fee of approximately $1,516 per mile for its substreet electric powerlines. Southern California Gas Company pays an annual fee of approximately $1,004 per mile for its substreet natural gas mains. Santa Monica's proposed fee for Shell is approximately $59,000 per mile.

fact that the practical burden of Santa Monica's actions with respect to oil pipeline operators may fall on nonlocal companies because of the absence of local oil pipeline operators does not establish discrimination against interstate commerce. *CTS Corp.*, 107 S.Ct. at 1649.

Second, Santa Monica's franchise fee poses no threat of inconsistent regulation. The amount of a franchise fee is unlike regulations on the method or mode of transportation that the Court has struck down. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580 (1981) (plurality) (invalidating regulation of truck size on interstate highways); *Southern Pac. Co. v. Arizona,* 325 U.S. 761, 773-74, 65 S.Ct. 1515, 1522, 89 L.Ed. 1915 (1945) (noting the "confusion and difficulty" that would attend the "unsatisfied need for uniformity" in setting maximum limits on train lengths). Interstate transportation of oil is not impeded by the fact that states, counties, cities, and private landowners may assess *different* charges for the use of land under or through which a pipeline passes.

Shell's equal protection argument is without merit. Santa Monica has legitimately distinguished between public utilities, which provide a public benefit to all of its citizens, and Shell's private pipeline operation, which does not. Moreover, the record does not reveal when, or under what circumstances, the franchise fees for the public utilities were set; property values may have increased dramatically since that time. Finally, oil pipelines may present different hazards than gas and electric lines and, accordingly, expose the city to greater liability. We therefore reject Shell's equal protection argument.

We also note that Shell is unable to maintain a challenge under the privileges and immunities clause of the federal Constitution, because corporations are not "citizens" for purposes of that clause. *See Hemphill v. Orloff*, 277 U.S. 537, 548-50, 48 S.Ct. 577, 579, 72 L.Ed. 978 (1928).

Shell's primary challenge is that Santa Monica's proposed franchise fee, viewed as a "user fee" or "rent," is disproportionate to the value of the city land and services rendered.[8] The Supreme Court has traditionally upheld user fees only if they bear a reasonable relationship to the government's costs. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) (upholding airport user fee collected to defray costs of airport construction and maintenance, where fee was apportioned to reflect amount of use and was not excessive in relation to the actual costs incurred); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 598-600, 59 S.Ct. 744, 752-53, 83 L.Ed. 1001 (1939) (upholding fee on caravan traffic that was not shown to be manifestly disproportionate to the cost of using the highways); *Ingels v. Morf*, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653 (1937) (striking down a fee on caravan traffic found excessive in comparison to costs of using highway); *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 51 S.Ct. 380, 75 L.Ed. 953 (1931) (invalidating user fee that was proportioned solely to earning capacity of vehicles, not number of passengers, mileage, or wear and tear on road incident to vehicles' use).

Similarly, in *Cory*, we made clear that user fees must be proportional to the value of the services rendered. There, we considered whether California's attempt to impose a fee

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[8] We agree with Shell's characterization of the franchise fee as a user fee or rent, as opposed to a tax. Whereas the level of taxation of a given activity lies almost exclusively within the determination of the taxing jurisdiction, *see Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S. Ct. 2946, 69 L.Ed.2d 884 (1981) (severance tax on coal mined in state upheld), Santa Monica has not acted in such a manner. By its own admission, it seeks to secure compensation for the [sic] Shell's use of substreet easement; it has not imposed a city-wide tax on oil pipeline operators regardless of whether the pipelines traverse publicly or privately owned land.

for an easement across state-owned submerged tidelands violated the dormant commerce clause. The "rent" for this easement was a flat 8% of the land's appraised value, plus an amount proportional to the volume of oil transported in the pipeline. We found no defect in the flat fee, but held that the volumetric charge unduly burdened interstate commerce, because as a "user fee" it was not apportioned to reflect the benefits conferred by the state. *Cory*, 726 F.2d at 1343-45.

The district court upheld the $59,000 per mile fee, finding that it resembled the portion of the user fee upheld in *Cory*. We agree with the district court that *Cory's* user fee analysis does not require invalidation of the proposed franchise fee because the fee was valued according to a reasonable percentage of the appraised value of land abutting the pipeline within the city. Because Santa Monica's fee is based on an evenhanded formula and not graduated by the amount of business done, it is not a "customs duty" on goods passing through its jurisdiction like the volumetric charge held invalid in *Cory*. Shell does not dispute Santa Monica's contention that the proposed franchise fee was based on an appraisal of 50% of the property value of the abutting land, capitalized at an annual rate of 12.5%.

As in *Cory*, we are unable to conclude that this valuation is "'manifestly disproportionate to the services rendered.'" *Commonwealth Edison v. Montana*, 453 U.S. 609, 621-22 & n.12, 101 S.Ct. 2946, 2955-56 & n.12, 69 L.Ed.2d 884 (1981) (quoting *Clark*, 306 U.S. at 599, 59 S.Ct. at 753). We conclude that Shell has not met its burden at summary judgment of showing that Santa Monica has discriminated against interstate commerce. Accordingly, we affirm the district court's grant of summary judgment.

II. *The State Constitutional Issue*

Shell also argues that the California Constitution precludes imposition of the proposed fee. *See* Cal. Const. art. XI, §7 ("A county or city may make and enforce *within its limits* all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.") (emphasis added); *id.* art. I, § 7 (equal protection provision). In *City of Los Angeles v. Shell Oil Co.*, 4 Cal.3d 108, 480 P.2d 953, 93 Cal.Rptr. 1 (1971), the California Supreme Court identified principles that restrict the ability of local governments to tax intercity activity:

> [I]n spite of the absence of a specific "commerce clause" in our state Constitution, other provisions in that Constitution — notably those provisions forbidding extraterritorial application of laws and guaranteeing equal protection of the laws . . . —combine with the equal protection clause of the federal Constitution to proscribe local taxes which operate to unfairly discriminate against intercity businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction. On the other hand, those constitutional principles do not *prohibit* local license taxes upon businesses "doing business" both within and outside the taxing jurisdiction; as long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction, no constitutional objection appears. However, and conversely, no measure of apportionment can satisfy the constitutional standard if the measure of tax is made to depend upon a factor which

> bears no fair relationship to the proportion of the taxed activity actually taking place within the taxing jurisdiction.

Id. at 124, 480 P.2d at 963, 93 Cal.Rptr. at 11. This case implicates neither the concern for extraterritorial application of local laws nor the problem of discrimination against intercity commerce.

Shell and several related cases are concerned primarily with the *method* of taxation; local taxes on a specified activity must be apportioned based on the amount of such activity conducted within and outside city boundaries. Such apportionment ensures that a local government does not apply its tax laws to extraterritorial activity and thus expose a business to double tax liability for the same activity. *See id.* at 118, 480 P.2d at 959, 93 Cal.Rptr. at 7. For example, in *Shell* the court invalidated a city business tax based on total gross receipts from a company's sales activities both within and outside the city. *Id.* at 124-26, 480 P.2d at 963-65, 93 Cal.Rptr. at 11-13. In *City of Los Angeles v. Belridge Oil Co.*, 42 Cal.2d 828, 831, 271 P.2d 5, 10 (1954), the court held that a city could tax the activity of selling within the city in spite of various extraterritorial events that contributed to such receipts. In *Carnation Co. v. City of Los Angeles*, 65 Cal.2d 36, 38-40, 416 P.2d 129, 130-32, 52 Cal.Rptr. 225, 226-28 (1966), the court upheld a city tax on manufacturing, processing, or handling goods within its boundaries that was based on the amount of gross receipts from sales of those goods. Finally, in *Volkswagen Pac., Inc. v. City of Los Angeles*, 7 Cal.3d 48, 58-59, 496 P.2d 1237, 1244-45, 101 Cal.Rptr. 869, 876-77 (1972), the court held that a city tax on wholesale selling activity that reached all gross receipts must be apportioned so as to exclude extraterritorial selling activities.

In this case, Santa Monica's proposed fee does not "depend upon a factor which bears no fair relationship to

the proportion of the taxed activity taking place within the taxing jurisdiction." *Shell,* 4 Cal.3d at 124, 480 P.2d at 963, 93 Cal.Rptr. at 11. The proposed flat fee is indifferent to the area or number of miles the pipeline traverses outside the city's boundaries, the volume of oil that passes through the pipeline, and Shell's receipts from its petroleum sales. Shell has not met its burden of showing that this formula has extraterritorial application. *See Shell* 4 Cal.3d at 126, 480 P.2d at 965, 93 Cal.Rptr. at 13 (holding that a plaintiff must show by " 'clear and cogent evidence' " that an apportionment formula in fact taxed extraterritorial activity or values) (quoting *Butler Bros. v. McColgan,* 315 U.S. 501, 507, 62 S.Ct. 701, 704, 86 L.Ed. 991 (1942); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 2513, 91 L.Ed. 2d 202 (1986) (holding that at summary judgment "the judge must view the evidence presented through the prism of the substantive evidentiary burden").

Shell advances a far broader meaning of extraterritorial application of local law that includes "extraterritorial effect." It argues that, because Santa Monica's actions may have an impact on areas outside its boundaries (such as causing Shell to decide to put its pipeline through another city), Santa Monica is thereby applying its law beyond its boundaries. Any action by a city, such as the enactment of a zoning ordinance or a decision to raise property taxes, will have extraterritorial impacts in this sense. Inaction, for that matter, would also have such extraterritorial effects. Nothing in *Shell,* the related cases, or the text of article XI, § 7 supports such a sweeping interpretation of the concern for extraterritorial application of local law.

The core of Shell's argument under the state constitution concerns the amount of the fee, not its formula. Thus, the argument must proceed on the basis of the *Shell* court's second concern, intercity discrimination. This concern

would prohibit a city from setting higher fees for intercity than for intracity oil pipelines. As discussed above, however, Shell has not established that Santa Monica has imposed franchise fees on a discriminatory basis. *See supra* pp. 1057-58 & n. 7.[9] We therefore affirm the district court's grant of summary judgment on the state constitutional issue.

III. *The Preemption Issue*

A. Ripeness

On cross-appeal, Santa Monica argues that the preemption issue is not ripe because, at this stage of the negotiations, it is not clear whether a new franchise agreement, if ever executed, will contain particular safety requirements that conflict with federal or state law. Santa Monica mischaracterizes Shell's primary challenge. Shell requests a declaratory judgment that Santa Monica may not impose *any* safety standards. That issue is ripe.

The doctrine of ripeness "prevents courts from deciding theoretical or abstract questions that do not yet have a concrete impact on the parties." *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 787 (9th Cir. 1986). The doctrine requires an inquiry into " 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' " *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1381 (9th Cir. 1986) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed. 2d 681 (1967)). Hence, ripeness is " 'peculiarly a question of timing' " that requires

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[9] A fairly apportioned tax may be high as long as it is not confiscatory. *See General Motors Corp. v. City of Los Angeles*, 5 Cal.3d 229, 243 n. 17, 486 P.2d 163, 172 n. 17, 95 Cal.Rptr. 635, 644 n.17 (1971). Shell has not alleged that the fee is confiscatory.

a court to "look at the facts as they exist today in evaluating whether the controversy . . . is sufficiently concrete to warrant [judicial] intervention." *Assiniboine*, 792 F.2d at 788 (quoting *Buckley v. Valeo*, 424 U.S. 1, 114-17, 96 S.Ct. 612, 680-81, 46 L.Ed.2d 659 (1976)).

The preemption issue posed by Shell is ripe for review because the disagreement over whether Santa Monica may impose any safety standards is clearly framed by the facts of this case. The city has unambiguously indicated its resolve to require at least some safety standards in the new franchise agreement. This issue has a concrete impact on the parties because the safety standards represent a major obstacle to the execution of a new agreement. The issue is not unripe because a mere possibility exists that a final agreement might not contain any safety standards or that no franchise would be granted at all. *See National Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562, 565-66 & n. 2 (9th Cir. 1987). We conclude that the question whether Santa Monica may impose any safety standards in the new franchise agreement is ripe. *See California Coastal Comm'n v. Granite Rock Co.*, ___ U.S. ___ , 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) (no ripeness problem noted in suit seeking declaration that federal law preempted a state agency from imposing *any* environmental standards in a mining permit, even though plaintiff had not secured a permit).[10]

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[10] We do not decide whether a challenge to the inclusion of any particular safety standard in the franchise agreement would be ripe. Shell has not challenged any particular standards. *See Granite Rock*, 107 S.Ct. at 1432 (refraining from deciding whether any particular standards that might be imposed in a future permit would conflict with federal law).

B. The Municipal-Proprietor Exemption from Preemption

Santa Monica contends that preemption analysis should not apply to its attempt to impose safety standards in its franchise agreement with Shell under the "municipal-proprietor" exemption. This theory stems both from the idea that preemption is a supremacy clause doctrine governing the actions of two sovereigns in our federal system, which does not apply to the actions of a private individual, and from practical concerns that a municipality, when acting as a proprietor, may have good reason to protect itself from liability resulting from the actions it authorizes. *See Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100, 103-04 & n.5 (9th Cir. 1981). Three appellate courts have suggested the existence of such a theory. *See City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 635-36 n. 14, 93 S.Ct. 1854, 1860-61 n.14, 36 L.Ed.2d 547 (1973) ("[A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor."); *Santa Monica Airport Ass'n,* 659 F.2d at 103-04 (noting "municipal-proprietor exemption from federal preemption," but holding that Congress did not intend to preempt a municipality from imposing noise standards at its own airport); *British Airways Bd. v. Port Auth.,* 558 F.2d 75, 83-84 (2d Cir. 1977). The theory proceeds on the premise that a private landowner may grant an easement to a pipeline operator on condition of compliance with safety standards that are more stringent than federal law.

The key inquiry under the municipal-proprietor exemption would be to determine whether Santa Monica is acting in a regulatory or proprietary capacity. As discussed in the context of the market participant exception, a city may not

use the guise of privity of contract to conduct otherwise forbidden regulatory activity. *See Wunnicke*, 467 U.S. at 97, 104 S.Ct. at 2245. Similarly, in the municipal-proprietor setting, a city may not condition a franchise renewal upon the settlement of a labor dispute, because such action is tantamount to regulating third-party relations preempted by federal labor law. *See Golden State Transit Corp.*, 106 S.Ct. at 1400-01; *see also Gould Inc.*, 106 S.Ct. at 1062-64 (holding that a state may not prohibit state purchases from repeat labor law violators because federal law preempts labor law enforcement). Presumably, our inquiry would involve a pragmatic judgment as to whether Santa Monica was attempting to regulate third-party relations in the market as in *Wunnicke, Golden State Transit*, and *Gould*, or whether its actions to limit exposure to municipal liability were sufficiently tied to the "immediate transaction." *Cf. Wunnicke*, 467 U.S. at 98, 104 S.Ct. at 2246 (noting that "simply as a matter of intuition a state market participant has a greater interest as a 'private trader' in the immediate transaction than it has in what its purchaser does with the goods after the State no longer has an interest in them"). However, we need not decide these close questions because, as discussed below, we conclude that federal law does not preempt Santa Monica from imposing all safety standards in a franchise agreement for an intrastate pipeline.

C. The Hazardous Liquid Pipeline Safety Act

The district court held that the Hazardous Liquid Pipeline Safety Act of 1979 ("HLPSA"), 49 U.S.C.A. §§ 2001-2014 (Supp.1987), preempts Santa Monica from imposing all safety standards on an *intra*-state pipeline. Our review of this legal conclusion is de novo. *Humboldt Oil Co. v. Exxon Co.*, 823 F.2d 373, 374 (9th Cir. 1987). We

determine the scope of federal preemption in an area by applying the traditional two-pronged inquiry:

> If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Granite Rock, 107 S.Ct. at 1425 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621 (1983) (citations omitted); *see also California Fed. Sav. & Loan Ass'n v. Guerra*, __ U.S. __, 107 S.Ct. 683, 689, 93 L.Ed. 2d 613 (1987) (preemption where there is (1) express statement, (2) sufficiently comprehensive regulation to infer that Congress left no room for state regulation, or (3) conflict).

As noted in our discussion of ripeness, this appeal concerns only the first prong. Hence, as in *Granite Rock*, we must search for some express statement or other clear indication of congressional intent to preempt Santa Monica's attempt to impose all safety standards. *See Granite Rock* 107 S.Ct. at 1426 ("[I]t is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity."); *id.* at 1432 (applying traditional analysis of search for "a congressional expression of intent to preempt"). Although the search for evidence of congressional intent to preempt all state regulation can be an imprecise undertaking, we believe that

the provisions of the HLPSA do not support the district court's conclusion.[11]

The HLPSA directs the Secretary of Transportation to establish "minimum Federal safety standards for the transportation of hazardous liquids and pipeline facilities." 49 U.S.C. App. § 2002(a) (1982). The statute expressly preempts states from imposing any additional safety standards in *inter*state pipelines: "No State agency may adopt or continue in force any safety standards applicable to interstate pipeline facilities or the transportation of hazardous liquids associated with such facilities." *Id.* § 2002(d). However, the act expressly permits additional state regulation of *intra*state pipelines: "*Any State agency* may adopt additional or more stringent safety standards for intrastate pipeline facilities and the transportation of hazardous liquids associated with such facilities, if such standards are compatible with the Federal standards issued under this chapter." *Id.* (emphasis added).

This distinction between interstate and intrastate pipeline facilities parallels the one made in the Natural Gas Pipeline Safety Act of 1968 ("NGPSA"), 49 U.S.C.A. §§ 1671-1686 (1976 & Supp. 1987), on which the HLPSA was modeled. *See* H.R.Rep. No. 97-89 (Pt. I), 97th Cong. 2d Sess. 2, *reprinted in* 1982 U.S.Code Cong. & Admin. News 4480, 4481; S.Rep. No. 96-182, 96th Cong., 1st Sess. 5, *reprinted*

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[11] The district court itself did not engage in the kind of searching inquiry undertaken in *Granite Rock*. Instead, it relied on two letters prepared by a California state deputy attorney general and a Department of Transportation official. These letters incorrectly assumed that the existence of congressional power to regulate all pipelines that affect interstate commerce means that Congress has preempted all state and local regulation, subject only to such delegation of its authority as it may indicate.

in 1979 U.S. Code Cong. & Admin.News 1971, 1975, 1989. The House report for the NGPSA explained:

> The relationship of Federal-State regulatory authority created by this bill differs as between local pipelines and interstate transmission lines. In the latter area, the lines of a single transmission company may traverse a number of States and uniformity of regulation is a desirable objective. For this reason, section 3 provides for a Federal preemption in the case of interstate transmission lines.
>
> On the other hand, in the case of local lines . . ., States may establish additional or more stringent standards, provided they are not inconsistent with the Federal minimum standards. The committee has provided for this different treatment because each State authority is uniquely equipped to know best the special aspects of local pipeline safety which are particularly applicable to that community.

H.R.Rep. No. 1390, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 3223, 3241; *see id.* at 3236.

In this case, the district court determined, and the parties agree, that whether the pipeline is interstate or intrastate in this case turns on a disputed issue of fact — the shipper's intent. *See Burlington Northern, Inc. v. Weyerhaeuser Co.*, 719 F.2d 304, 307-10 (9th Cir. 1983). Viewing the evidence in the light most favorable to Santa Monica, the district court assumed that the pipeline was intrastate.[12] Thus, Shell

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[12] The HLPSA regulations define an interstate pipeline as "a pipeline or that part of a pipeline that is used in the transportation of hazardous liquids in interstate or foreign commerce." 49 C.F.R. § 195.2 (1986). An

would be entitled to summary judgment on the federal preemption issue only if Santa Monica is *not* "[a]ny State agency" under 49 U.S.C. App. § 2002(d) (1982).

The HLPSA does not define the term "State agency." The two letters on which the district court relied[13] argued that "State agency" in § 2002(d) means "state" as opposed to "municipal" or "local." This reading has two significant problems. First, the HLPSA itself specifically contemplates that "municipalities" may be "State agencies." *See* 49 U.S.C.App. § 2012(a)(9)(A), § 2012(a)(10)(A) (1982); *cf. id.* § 1674(a) (same under the NGPSA). Second, applying the restrictive reading of "State agency" to the sentence in § 2002(d) concerning *inter*state pipelines leads to the anomalous conclusion that the HLPSA preempts state-level agencies from regulating interstate pipelines, while saying nothing about municipalities or other local bodies. The only sensible reading of this provision is that the HLPSA

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intrastate pipeline is defined as "a pipeline or that part of a pipeline to which this part applies that is not an interstate pipeline." *Id.* An appendix states that a pipeline that begins off-shore on the outer continental shelf and enters a state is an interstate pipeline. *See* 49 C.F.R. pt. 195 app. A, ex. 7 (1986). But a pipeline that merely transports oil from two points within a state may be an intrastate pipeline. *See id* ex. 1; *see also Southern Pac. Pipe Lines, Inc. v. U.S Dep't of Transp.*, 796 F.2d 539, 542 (D.C. Cir. 1986) (lateral pipelines used solely for intrastate carriage are intrastate, even if physically connected to interstate pipeline facility). Although on appeal Shell has sought to introduce a letter from a Department official stating that the pipeline is interstate, the record in this case does not conclusively establish whether the pipeline is interstate or intrastate. Thus, like the district court, we assume for the purpose of summary judgment that the pipeline is intrastate.

We note that, in the event that the pipeline is determined to be interstate, the district court would then need to address the municipal-proprietor exemption from preemption.

[13] *See supra* note 11.

preempts regulation of *inter*state pipelines by all "State agencies" — including both state and local bodies. This inclusive reading of the term "State agencies" would similarly apply to the other sentence in § 2002(d) concerning *intra*state pipelines. "Congress could not have intended the same phrase to have different meanings in two consecutive sentences." *Southern Pac. Pipe Lines, Inc. v. United States Dep't of Transp.*, 796 F.2d 539, 542 (D.C.Cir.1986) (referring to different phrase in § 2002(d)).

The district court adopted a different interpretation. It interpreted the term "State agency" in § 2002(d) to mean "[a]ny State agency" (including municipalities) to which regulatory authority had been delegated under § 2004(a). Under the HLPSA, the Secretary of Transportation must cede its authority to prescribe and enforce minimum federal standards for intrastate pipelines to a state agency that annually certifies that it has adopted and will enforce those minimum standards. 49 U.S.C.App. § 2004(a) (1982).[14] The district court's reading is also problematic. First, as in the foregoing analysis, this interpretation would result in the odd conclusion that § 2002(d) would preempt certified state agencies (whether state or municipal) from imposing additional standards on *inter*state pipelines, but would say nothing about uncertified state agencies (whether state or municipal).

Second, the bare fact is that § 2002(d) does not limit the term "[a]ny State agency" to certified state agencies. If Congress had intended to limit that term to state agencies that are certified under § 2004(a), one would have expected it to have done so expressly. Other provisions in the HLPSA expressly limit the term "State agencies" to agencies that are certified. *See, e.g., id.* §§ 2002(h), 2004(d)(1), 2009(a),

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[14] California has designated its state fire marshal to be such a certified state agency. Cal.Gov't Code § 51010 (West Supp.1987)

2012(a)(9)(A), 2014(b)(1). Other provisions refer to a "State agency" that is not certified under § 2004(a). *See id.* §§ 2004(b), 2004(g), 2012(a)(10)(A). The passages in the legislative history discussing additional, compatible state standards do not restrict the authority to issue such standards only to state agencies that have been certified; the legislative reports acknowledge broadly, and without qualification, that states may impose additional, compatible standards. *See* H.R.Rep. No. 99-121 (Pt. I), 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S. Code Cong. & Admin.News 4978, 4979; H.R.Rep. No. 98-780 (Pt. I), 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Admin.News 4480, 4481. We acknowledge that some ambiguous evidence exists that at least would suggest a contrary conclusion. *See* 49 C.F.R. pt. 195 app. A, at 635 (1986); *Southern Pac. Pipe Lines*, 796 F.2d at 540 (suggesting in dicta, without discussion, that a state may impose additional safety standards on intrastate lines only after it has been certified under § 2004). For example, the appendix to the hazardous pipeline regulations states:

> [T]he HLPSA provides for a national hazardous liquid pipeline safety program with nationally uniform minimum standards and with enforcement administered through a Federal-State partnership. The HLPSA leaves to exclusive Federal regulation and enforcement "interstate pipeline facilities". . . . For . . . "intrastate pipeline facilities," the HLPSA provides that the same Federal regulation and enforcement will apply unless a State certifies that it will assume those responsibilities. A certified State must adopt the same minimal standards but may adopt additional more stringent standards so long as they are compatible.

49 C.F.R. pt. 195 app. A, at 635 (1986). One fair reading of this passage is that the Department of Transportation believes that the HLPSA provides for *exclusive* federal authority over intrastate pipelines, unless a state agency is certified. However, the passage may also reflect nothing more than the uncontested point that the HLPSA provides for exclusive *minimum* federal regulation and enforcement, unless a state agency is certified. *See also* 50 Fed. Reg. 39,013 (similar ambiguous passage). We do not believe that this ambiguous passage provides a clear indication of the Department's position on the issue posed in this case. We express no view on the extent to which a contrary interpretation of the HLPSA by the Department would affect our own interpretation of the HLPSA.

The Department's stated policy is "to allow states to assume as much responsibility for pipeline safety within their states as possible, subject only to the limitations of the HLPSA." 50 Fed. Reg. 39,008, 39,011 (1985); *see also* 49 U.S.C. App. § 2014(f) (1982) (providing that a violation of "any safety standard or practice of any State" shall be a violation of federal law "only to the extent that such standard or practice is not more stringent than the comparable Federal safety standard"); *cf. United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F.Supp. 1138, 1139-42 (E.D.La. 1970) (holding that the NGPSA preempts state political subdivisions from regulating *inter*state gas pipelines, but observing in dicta that a local body could impose a compatible safety ordinance on local transmission lines), *aff'd per curiam*, 445 F.2d 301 (5th Cir.1971). Finally, the HLPSA authorizes the Secretary

> to consult with, and make recommendations to . . . State *and local* governments . . . for the purpose of developing and encouraging activities, *including the enactment of legislation*, . . . to

> improve State *and local pipeline safety programs* relating to hazardous liquids.

49 U.S.C. App. § 2011(c) (1982) (emphases added). Thus, we see no apparent reason to give the unrestricted term "[a]ny State agency" in § 2002(d) the restricted meaning of "[a]ny certified State agency."

[5] The district court's conclusion that the HLPSA preempts municipalities (or other noncertified state agencies) from imposing additional, compatible safety standards on intrastate pipelines does not withstand the type of searching inquiry undertaken in *Granite Rock*. Accordingly, we hold that the HLPSA does not preempt Santa Monica from imposing all safety standards on intrastate pipelines and vacate the district court's grant of summary judgment in favor of Shell.[15] We note that our holding in no way authorizes Santa Monica to impose any particular safety standard. As in *Granite Rock*, the plaintiff's challenge to the agency's authority to impose *any* standards "was broad and absolute; our rejection of that challenge is correspondingly narrow." 107 S.Ct. at 1431. We have no occasion to decide, under the second prong of the preemption inquiry, whether the HLPSA would preempt any particular standard on the ground that it conflicts with federal law or is inconsistent with federal objectives.

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[15] Whatever preemption may exist must be rooted in the California Pipeline Safety Act ("CPSA"), Cal. Gov't Code §§ 51010-51020 (West Supp. 1987). The district court did not address the question whether the CPSA preempts local bodies, and the parties have not briefed the issue on appeal. We leave this question for further development on remand.

CONCLUSION

For the reasons discussed above, the district court's judgment in No. 86-6103 is affirmed; the proposed franchise fee does not violate the federal commerce clause or the analogous state constitutional provisions. The judgment in No. 86-6206 is vacated and remanded: assuming the pipeline is intrastate, the HLPSA does not preempt Santa Monica from imposing all safety standards. The case is remanded for consideration of whether the pipeline is interstate and whether states law preempts Santa Monica.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

WIGGINS, concurring separately:

I concur in the court's opinion, but believe that some of its unintended effects could have been resolved by a clear finding that Shell's pipeline is in interstate commerce.

For the purposes of resolving the issues raised by Shell's commerce clause arguments, the court necessarily assumes that the pipeline is operating in an interstate fashion. This was for reviewing the summary judgment against Shell. But for the purposes of resolving Santa Monica's preemption arguments, we had to assume that the pipeline was in *intra*state commerce.

What I take issue with is the court's conclusion that the record is unclear on the pipeline's status as a part of interstate or intrastate commerce. I have no doubts that, as a matter of law, it is interstate and that the Hazardous Liquids Pipeline Safety Act (HLPSA), 49 U.S.C.A. §§ 2001-2014 (Supp. 1987), preempts Santa Monica's safety regulations.

That the pipeline originates from the outer continental shelf (OCS) should be enough to validate this conclusion.

See 49 C.F.R. pt. 195, app. A & ex. 7 (1986). The fact that the pipeline connects with other pipelines which terminate in other states seems to me also to be decisive. *Id.* ex. 4. Moreover, Shell's pipeline could not really be considered as a "delivery lateral," as this term was used by another appeals court, *Southern Pac. Pipe Lines, Inc. v. United States Dep't of Transp.*, 796 F.2d 539, 541 (D.C. Cir. 1986), when it ruled that the operation in question was intrastate. *Id* at 542. Rather, it seems clear that Shell's pipeline from Ventura County to the Wilmington refinery is a trunk line, originating from the OCS, its oil already in interstate commerce. The guidelines offered by the HLPSA should be enough to make this determination and no recourse need be made to the "intentionalist" theory which the parties, apparently, believe is controlling.

I would conclude that the pipeline operates in interstate commerce. Moreover, Santa Monica would not be exempted under some "municipal-proprietor" exception to the preemption doctrine, for the same reasons stated by the court in its discussion of why Santa Monica cannot avail itself of the "market participant" exception to the commerce clause.

This case is narrow in its reasoning, as it should be. But it also sounds a clarion call to Congress for action. It is true that Congress has not prevented the disruption of interstate traffic in petroleum products which Santa Monica's imposition of rent, if it were emulated by every municipality on the pipeline's course, presents. The only check on this ominous form of over-reaching by local authorities against politically unpopular enterprises, such as oil producers, is the vague notion of proportionality of rent to services provided by the city. Santa Monica did not, I agree, cross the line in this case. But I do have my doubts whether this decision addresses an invitation to like-situated localities in California (or Nevada and Alaska, for that matter), to press

the limits of proportionality, and enter the realm of confiscation. Besides increasing prices to consumers of gasoline, the result of all this will be the "Balkanization" of the economy. This is more than a quaint and picturesque phrase describing a hypothetical danger. The Supreme Court intended it as a warning to deter the states from interfering in the national economy. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1730-31, 60 L.Ed.2d 250 (1979). The danger f exorbitant rents on oil pipeline traffic and the resultant burden to commerce cannot be met in this court; it must be answered by Congress.

APPENDIX B

No. CV 82-2362-RJK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHELL OIL COMPANY,
a Delaware corporation,
Plaintiff,
vs.

CITY OF SANTA MONICA,
a municipal corporation,
Defendant.

MEMORANDUM OF DECISION AND ORDER

I. INTRODUCTION

The essential facts in this case are uncontroverted. In 1941 the defendant, City of Santa Monica, negotiated and signed a forty year franchise agreement with the plaintiff,

Shell Oil Co.[1] Pursuant to the franchise, Shell installed and operated a pipeline 10 inches in diameter and 3.9 miles in length beneath public city streets. This segment is part of an 82.2 mile pipeline used by Shell to transport crude oil from Ventura County to its Wilmington refinery in Los Angeles County.

In 1981 the franchise came up for renewal and Santa Monica proposed two changes in the terms of the agreement: first, a rent increase from $1,000 per mile to $59,000 per mile and, secondly, incorporation of seven pages of detailed safety standards regulating the pipeline. Shell brought this action seeking, *inter alia*, a declaration (1) that the Commerce Clause of the federal constitution, as well as a similar California constitutional provision, limit the franchise fee payable to Santa Monica to an amount no greater than the value of actual services or benefits provided by the City; and (2) that any and all franchise terms regulating safety are preempted by federal law.

In their cross motions for summary judgment, now under submission, both parties agree that this case, in its present posture, presents, for the most part, pure issues of law.

II. FRANCHISE FEE

A. FEDERAL LAW

The Commerce Clause, U.S. Const. Art. I § 8 cl. 3, prevents a State from taking any action which impedes the free flow of trade between States. *Freeman v. Hewit*, 329 U.S. 249, 252, 67 S.Ct. 274, 276, 91 L.Ed. 265 (1946). However, an exception exists where the State or its political subdivision acts as a market participant. *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed. 244 (1980);

[1] The actual signatory was Shell's predecessor, referred to herein, for convenience, as "Shell".

Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed. 270 (1976).

Santa Monica argues that the Commerce Clause places no restrictions on the price term of a franchise agreement entered into by the City itself. The City asserts that rather than regulating firms' private commercial dealings, it participates in a market transaction with a freely contracting private corporation. Santa Monica cites *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), which held municipal contracting to be a form of market participation.

Shell relies almost exclusively on *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984), *aff'd by an equally divided court*, 471 U.S. __ , 85 L.Ed. 2d 61 (1985) ("*Cory*"), a case involving very similar facts. *Cory* held that State-owned monopolies were outside the scope of the market participant doctrine. In *Cory*, the State of California claimed to be a market participant in its dealings with several oil companies. The Ninth Circuit, however, held that a State is not protected by the market participant doctrine where it holds a "complete monopoly" over the relevant market.

The oil companies in *Cory* owned and operated offshore drilling rigs and were unable to transport crude oil onshore without passing over tidal and submerged lands owned by the State of California. Under the terms of their leases, the companies paid to California a flat annual "rent" in the amount of six percent of the appraised value of the land over which the oil passed. In 1976 California amended the rental regulations so as to: (1) increase the six percent charge to eight percent; and (2) impose a "volumetric throughput" charge which would vary the rent in direct proportion to the gallonage being piped. The court in *Cory* struck down the latter portion of the challenged regulations as violative of the Commerce Clause.

Cory held, first, that California could not invoke the market participant doctrine because it held a monopoly over coastal access and, secondly, that the commerce clause prohibits a volumetric throughput charge by which rent for the leasing of state-owned tidelands varies with the gallonage of oil shipped in interstate commerce. Shell contends that, under *Cory*, first, Santa Monica holds a monopoly which prevents it from invoking the market participant doctrine, and, secondly, the per-mile franchise fee exhibits the same constitutional defects as the per-gallon throughput charge. As discussed below in parts "1" and "2" respectively, neither of these contentions has merit.

1. Monopoly

In *Cory*, there was no practical way for the plaintiff oil companies to transport oil from their refineries without traversing the tidal and submerged lands owned by the defendant State of California. Due to the physical and practical immobility of the plaintiffs' offshore processing plants, combined with the California Stand [sic] Lands Commission's "complete monopoly" over coastal access, the oil companies in *Cory* were unable to go to any other competitors for the required strip of shoreline. They could not "shop around" but had to renew their leases on whatever terms the State demanded. For these reasons, the court in *Cory* held California was a monopolist, rather than a competitor, in the relevant market, and for that reason, the market participant doctrine did not apply.

Shell argues that it cannot "shop around," but must deal with the City and, therefore, the *Cory*, State-owned monopoly exception to the market participant doctrine applies. Santa Monica responds that more is required to prove "monopoly" than a complaint by one party to franchise renewal negotiations that it does not feel free to shop around. The city controls a four mile strip as

compared to the State control, in *Cory*, of hundreds of miles of coastline.

Moreover, the strip in issue here, unlike the California coastline, has no "strategic geographic" significance, 726 F.2d at 1345. Shell's right of way does not run east/west from Santa Monica beach inland; rather it runs north/south, parallel to, and only a few blocks from, the City's eastern boundary.

The oil producers in *Cory* faced California-owned tidal and submerged lands no matter where they looked for coastal access. In this case, by contrast, Santa Monica has shown — and, in fact, Shell has conceded[2] — the existence of a number of alternative means of transporting oil to its Wilmington refinery. Shell could obtain rights of way from private or other municipal landowners; it could negotiate exchange agreements with owners of other private pipelines; or it could use tank trucks or barges.

Shell could also pay to use common carrier pipelines which, under Cal. Pub. Util. Code § 615, have power of eminent domain. In connection with this option, the City argues that Shell is seeking the best of both worlds. If Shell prevails, and Santa Monica must renew for no more than the actual value of benefits or services the City provides, Shell will enjoy the benefits of eminent domain without the concomitant rate and regulatory restrictions imposed on common carrier pipelines. Over the forty year franchise period just expired, the volume of oil increased thirty percent and its value rose sharply; yet Shell was immune from increases in the franchise fee because the City was bound to honor the contract. Having enjoyed the benefit of

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[2] *See* Plaintiff's Opposition filed February 18, 1986 at 24: "True, Shell would have various potential options for supplying the Wilmington refinery but Shell cannot presently be certain that any of these options would be reliable."

its bargain, Shell now claims the franchise is not a contract at all but, rather, a "user" fee, and hence that, under *Cory*, the United States Constitution controls the price term.

Santa Monica makes the point that no one but the franchisor ever has power to renew a franchise; by definition, no franchisee can ever "shop around" for renewal. Only in a trivial sense may the term "monopoly" be applied to a franchisor by virtue of the fact it is the lone "seller" of renewal rights. The same reasoning applies to grantors of easements. Because land is unique, the grantee can never "shop around" for renewal of an easement. And even if the term "monopolist" is applied to Santa Monica in its role as franchisor or grantor, it still does not follow that the City could command monopoly profits because here, it is dealing with a monopsonist. Shell is the only potential "buyer" of this particular easement, or franchise, because it is connected at both ends to its existing pipeline.

Shell argues that Santa Monica enjoys tremendous leverage because the seventy eight miles of remaining pipeline are dependent on this four mile segment. Bargaining leverage does not, however, define monopoly. Rather, it tends to be a usual result of monopoly power. The four mile strip in this case could have been laid a few blocks east of its present location, avoiding Santa Monica altogether. This is quite dissimilar from *Cory*, which involved California's control over the Pacific Coast.

Moreover, the Supreme Court has explicitly rejected the view that federal constitutionality of a state levy hinges on questions of monopoly power:

> Nor do we share the appellants' apparent view that the Commerce Clause injects principles of antitrust law into the relations between the States by reference to such imprecise standards as whether one State is "exploiting" its "monopoly"

> position with respect to a natural resource when the flow of commerce among them is not otherwise impeded. The threshold questions whether a State enjoys a "monopoly" position . . . would require complex factual inquiries about such issues as elasticity of demand for other alternative sources of supply.

Commonwealth Edison Co. v. Montana, 453 U.S. 607, 619-600 n.8, 101 S.Ct. 2946, 2954-55 (1981) ("Montana").

As a matter of economics, semantics or antitrust principles, there may be room for disagreement over whether Santa Monica should be labeled a monopolist. However the issue cannot be decided by labels. *Cory* was marked by California's control, from Mexico to Oregon, of this country's western shore. In contrast, Santa Monica's control over a four mile inland strip shows that the City possesses no geographic dominance comparable to that found in *Cory.*

Shell's remaining argument for application of the State-owned monopoly exception to the market participant doctrine rests on the lack of renewal fee restrictions in the provisions of the original franchise agreement. The City is free to apply great leverage in negotiating renewal. However, the definition of monopoly for purposes of deciding constitutional claims ought not depend on the terms of a contract. As the court stated in *Montana*: "It would be strange indeed if the legality of a tax could be made to depend on the vagaries of the terms of contracts." *Id.* quoting the State court in *Montana,* 615 P.2d 847, 856

(1980). The same principle applies here.[3] Shell maintains that the terms of the agreement leave the franchisee open to exploitation. However, in arms length negotiation between parties of equal bargaining power, such a concession is presumably compensated for by other valuable consideration when the franchise is first negotiated.

In sum, the "complete monopoly" enjoyed by California in *Cory* rested on its strategic geographic dominance over relevant portions of the western shoreline of the continental United States. Here, the City does not possess any similar market dominance. Therefore, the *Cory* State-owned monopoly exception to the market participant doctrine does not apply, and Santa Monica is not prohibited from charging market value.

2. Rent vs. User Fee

Even assuming *Cory* controls and the market participant doctrine does not apply, the fee in this case "is not graduated by the amount of the business, nor . . . fixed for the privilege of doing business." *Cory*, 726 F.2d at 1344, quoting *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97, 13 S.Ct. 485, 487 (1893). Thus, the fee does not exhibit the unconstitutional defects found in the volumetric charge struck down in *Cory*. Instead, the flat franchise fee resembles the percent-of-appraised-value portion of the regulations challenged in *Cory*. This part of the regulation, quoted and explained, but not invalidated by *Cory*, imposed a flat charge of six percent of appraisal value as rent for the right of way. In 1976 when the volumetric surcharge was added, the flat rate was also increased to eight percent. In part "b" of the *Cory* opinion, the court struck down only

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[3] The fact that *Montana*, unlike Santa Monica, denominated its charge a "tax" is not a decisive difference. *Cory* holds, "it is the practical effect of an exaction, not its label, that is the focus of analysis under the Commerce Clause." 726 F.2d at 1344.

the volumetric charge which had been designed and defended as a user fee. According to *Cory, Montana, supra,* forbids user charges, such as a gallonage charge, which bear no relation to actual use. *Cory* cited *Montana* for the proposition that "these 'user' charges cannot be disproportionate to the benefits conferred by the State." Neither the challenged franchise fee in this case, nor the six percent (later, eight percent) flat fee in *Cory,* is forbidden by *Montana.*[4]

In the portion of *Montana* relied on by both Shell in this case, and by the court in *Cory,* the Supreme Court discussed charges which are designed and defended as user fees, and noted that Commerce Clause cases have required such charges to be calculated by a formula which measures actual use. Setting that portion of *Montana* in its proper context, it becomes apparent — although *Cory* did not reach the issue — that six percent and eight percent charges were constitutionally permissible under *Montana* without any showing that they were equal to the value of State provided services or benefits.

In *Montana,* coal producers challenged a severance tax as clearly repugnant to the principles underlying the Commerce Clause. There was evidence showing the severance "tax" had been designed to manipulate "tax escalation" clauses in existing long term supply contracts between Montana producers and midwest coal-burning power plants which were dependant [sic] on low-sulphur Montana coal. 453 U.S. 641 n.6 (Blackmun, J. dissenting).

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[4] Outside the Ninth Circuit, even the volumetric throughput charge may be unobjectionable under *Montana,* since *Cory* was affirmed by an equally divided court. Santa Monica implies that Justice Powell would have upheld the charge since his opinions and concurrences strongly support the market participant doctrine. That is irrelevant, as *Cory* is fully binding on this Court.

As Montana state legislative sponsors candidly explained: "In other words, the local companies simply add the additional taxes to their bill and the entire cost is passed on to the purchasers in the midwest or elsewhere." *Id.* (quoting Towe, *Explanations of Reasons for Montana Coal Tax*, at 4). Numerous facts in *Montana* bear out the charge that the State pursued a deliberate and sophisticated "policy of 'OPEC-like revenue maximization.' " *Id.* at 643, quoting R. Nehring & B. Zycher with J. Wharton, *Coal Development and Government Regulation in the Northern Great Plains: A Preliminary Report*, 148 (1976).

The State of Montana also held a strategic geographic position and could well be considered a "monopolist," depending on the definition of the relevant market. Montana contained roughly 70 percent of all known reserves of low-sulphur coal. *Id.* at 638 n.1.

Also, in *Montana*, there was no correlation between the severance tax and the services or benefits conferred by the State. Plaintiffs had offered to prove the challenged tax of $2 per ton exacted more than 100 times the maximum amount of "legitimate local impact costs." *Id.* at 621 n.10.

Notwithstanding all of the above, the Supreme Court upheld the severance charge, emphasizing that it was "computed at the same rate regardless of the final destination of the coal." *Id.* at 618. The $59,000 per mile fee challenged here in the instant case uses an equally "evenhanded formula" since the same rate applies regardless of the destination of oil being piped.

The practical effect of the levy in *Montana* raised troubling Commerce Clause concerns. *See* 453 U.S. at 637 (White, J. concurring): "This is a very troublesome case for me, and I join the Court's opinion with considerable doubt and with the realization that Montana's levy on consumers

in other States may in the long run prove to be an intolerable and unacceptable burden on commerce."

The majority did not contest that some aspects of *Montana* raise significant concerns, but ruled that "appellants labor under a misconception about a court's role in cases such as this." 453 U.S. at 627. *See also id.* at 628: "Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress when particular state taxes are thought to be contrary to federal interests." Thus, *Montana* tends to bear out Santa Monica's objection that more is required to prove a State-imposed burden on commerce is unconstitutional than to describe it as "undue" or "burdensome." *See also City of Pittsburgh v. Alco Parking Corporation*, 417 U.S. 369, 373, 94 S.Ct. 2291, 2294, 41 L.Ed.2d 132 (1974) (prohibitively high rate of tax constitutionally unobjectionable). The generalized sense that a State-imposed levy implicates Commerce Clause concerns is not a sufficient basis for holding the fee unconstitutional. *See Montana*, 453 U.S. at 628.

All of the foregoing serves to set in context the specific text of *Montana* which was relied upon in *Cory* and by Shell in this case. That text reads as follows:

> [W]e put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services. [Footnote 12 . . . Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged do not appear to be manifestly disproportionate to the services ren-

> dered. . . ." *Clark v. Paul Gray, Inc.*, 306 U.S. at 599, 59 S.Ct. at 753.]

453 U.S. at 621-22.

"Those cases" referred to in this passage all involved a user fee, akin to a toll, levied directly upon goods or persons making use of a State-owned and operated facility to move along in the stream of interstate commerce. The gallonage charge in *Cory* was one such fee. The six percent and eight percent flat fees in *Cory*, by contrast, were not designed to meter "use." Hence the court in *Cory* did not require, and California did not produce, evidence that six percent or eight percent — as opposed to two percent or ten percent — equalled the value of benefits or services provided by the State to the oil companies.

The City argues that the franchise fee in this case bears no resemblance to the classic "user fee" situation arising when an item of commerce merely passes through the jurisdiction of the taxing body. *See e.g., Evansville-Vandenberg* [*sic*] *Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349 (1972) (head tax on enplaning passengers); *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153 (1978) (state airport flight fees); *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 56 S.Ct. 194 (1935) (state port vessel fees).

In those cases, Santa Monica contends, the *only* relationship with the taxing body was that commerce passed through the jurisdiction. In the instant case, by contrast, the City emphasizes that Shell's "taxed activity" goes far beyond the mere fact that Shell's crude passes through the City. Shell's pipeline physically and permanently occupies space in the subsurface of the City's streets.

Santa Monica goes on to point out that it negotiates many leases of City-owned facilities including, for example, space at the Santa Monica Pier and Santa Monica Airport. In

these settings, no one has ever challenged a City's right to obtain market rent.

At bottom, Santa Monica relies on the distinction between charges levied directly on persons or goods making use of State provided facilities to move in the stream of interstate commerce (e.g. petroleum gallonage, airplane passengers, highway vehicles or commercial vehicles) as opposed to charges negotiated in exchange for physical possession of State owned property granted exclusively to one private party. The per mile charge in this case is distinguishable, on that basis, from the volumetric throughput charge struck down in *Cory*. While Santa Monica's franchise fee is somewhat analogous to the six percent and eight percent flat rates in *Cory*, the court did not find them objectionable. Thus, Santa Monica's franchise fee survives Commerce Clause scrutiny.

B. STATE LAW

In evaluating the validity of the fee under the California Constitution, this Court must rule exactly as it believes the highest state court would rule, even if such decision involves the expansion of existing caselaw. *See Reding v. Texaco, Inc.*, 598 F.2d 513, 519 (9th Cir. 1979); 19 Wright Miller & Cooper, *Federal Practice and Procedure*: § 4507.

The parties correctly note that the constitutionality of the franchise fee — which is the only state law issue ripe for summary judgment — turns on the precedential value of one case: *City of Los Angeles v. Shell Oil*, 4 Cal.3d 108, 93 Cal. Rptr. 1 (1971) ("*Los Angeles*"). In brief, *Los Angeles*, and the preceding case, *City of Los Angeles v. Belridge Oil Co.*, 48 Cal.2d 320, 323 "held: The requirements of due process and equal protection compel an *apportionment* of receipts attributable to business carried on *within* and *without* the city." *Volkswagen Pacific, Inc. v. City of Los*

Angeles, 7 Cal.3d 48, 101 Cal. Rptr. 869, 877 (1978) (emphasis added).

In *Los Angeles*, the court expanded upon *Belridge*, noting that the focus of inquiry is into the sole issue of apportionment. The court explained that there are two concerns underlying this constitutional requirement: prevention of (a) extraterritorial application of local laws and (b) discrimination against intercity commerce. The principles requiring apportionment form the sum and substance of California law to be applied in this case, and are explained in the following passage:

> The foregoing review of the constellation of cases to which the *Belridge* decisions belong enables us to state with some confidence the principles which support and inform those decisions. In the first place, it is clear that in spite of the absence of a specific "commerce clause" in our state Constitution, other provisions in that Constitution — notably those provisions forbidding extraterritorial application of laws and guaranteeing equal protection of the laws — combine with the equal protection clause of the federal constitution to proscribe local taxes which operate to unfairly discriminate against intercity businesses by subjecting such businesses to a measure of taxation which is not fairly apportioned to the quantum of business actually done in the taxing jurisdiction. On the other hand, those constitutional principles do not prohibit local license taxes upon businesses "doing business" both within and outside the taxing jurisdiction; as long as such taxes are apportioned in a manner by which the measure of tax fairly reflects that proportion of the taxed activity which is actually carried on within the taxing jurisdiction, no

> constitutional objection appears. However, and conversely, no measure of apportionment can satisfy the constitutional standard if the measure of tax is made to depend upon a factor which bears no fair relationship to the proportion of the taxed activity actually taking place within the taxing jurisdiction.

Id. at 123, 93 Cal. Rptr. at 11 (emphasis added).

Predicting how the California Supreme Court would apply *Los Angeles* to this case is necessarily an imprecise undertaking. The question whether the principles of *Los Angeles* should be expanded to forbid the \$59,000/mile fee is a novel question of state law.

Santa Monica distinguishes the fee as a negotiated contract term, not a tax. However, just as the California Supreme Court has struck down taxes other than the particular "gross receipts tax" invalidated in *Los Angeles,* the court could also strike down non-tax charges such as license or franchise fees if they exhibit either (a) intercity discrimination or (b) extraterritorial effect.

As matters now stand, the \$59,000/mile fee could be seen to exhibit these infirmities. Under the guise of simply extracting market value for a right of way, Santa Monica may be using as leverage the 78 miles of pipeline lying beyond the four mile segment under Santa Monica streets.

However, as matters stood in 1941, Santa Monica had no such leverage. No pipe was yet laid. It was Shell who could negotiate among cities for the most advantageous terms. It may be that the nub of this case is whether to view the parties' rights as matters now stand — with Shell having invested a tremendous value in the pipeline — or *circa* 1941 when Shell voluntarily submitted to a forty year arrangement with no contractual protections for either party upon expiration.

Viewed as of the time the franchise was negotiated, Santa Monica asserts it was acting in a proprietary, not sovereign, capacity: "A franchise or license may be the product of either governmental or private action." *People ex rel. Flourney v. Yellow Cab Company,* 30 Cal.App.3d 41, 106 Cal.Rptr. 874, 878 (1973). If Shell were to sign a contract allowing it to drill under a private landowner's ground for forty years, that owner would be free to confiscate the remaining oil when the franchise expired.

For Shell to persuasively contend that the California Supreme Court would expand *Los Angeles* to invalidate this fee, it must address the following line of reasoning suggested by Santa Monica: Under the California Constitution, if the pipeline weren't already in place and Shell approached Santa Monica with an initial proposition to lay it, Santa Monica could refuse to agree to grant any right-of-way. Santa Monica should now possess the lesser included power to simply refuse to renew, regardless of price; logically, then, the right to charge a high price follows *a fortiori* from the right to refuse to deal. Shell fails to refute that Santa Monica could *initially* refuse to deal but argues Santa Monica cannot refuse *now* because the line is already in the ground. Hence, Shell is necessarily demanding more than it bargained for. Shell could have asked, and paid, for 40 or 80 or 100 years, or rights in perpetuity, or conditions limiting fee escalation upon renewal; Shell settled instead for 40 years with no protection upon renewal; the company now asks the Court to rewrite its deal. In sum, the time for a franchisee to consider the renewal problem is when it initially negotiates for the franchise. These considerations, Santa Monica concludes, would counsel against expansion of the holding of *Los Angeles*.

In 1941, Santa Monica could not have demanded an excessive fee based on leverage arising from its strategic position in relation to extraterritorial segments of the

pipeline. If Shell finds itself in a worse position now, it is only because of decisions it freely made to sign a contract and lay a pipeline. Shell has never addressed the point that its negotiating disadvantage, as connected to the extraterritorial considerations, is self-imposed.

Additionally, the thrust of *Los Angeles* can be distinguished as solely concerning the *method* of assessing taxes and nowhere addressing the *rate* of tax. A fairly apportioned tax may be high so long as it is not confiscatory. *See General Motors Corp. v. City of Los Angeles,* 5 Cal.3d 229, n.17, 95 Cal.Rptr. 635, 644 n.17 (1971). Santa Monica's method of assessing this "tax" is to negotiate the market value of the easement. Shell nowhere alleges that $59,000/mile is confiscatory. Besides, the right of way belongs to Santa Monica; it cannot confiscate what it already owns. *Los Angeles* neither forbids excessive taxes nor teaches how to define "excessive." *Los Angeles* is nowhere concerned with high taxes, only with discriminatory or extraterritorial taxes.

It appears, therefore, that the California Supreme Court would uphold this fee. The doctrine announced in *Los Angeles* draws upon the combined effect of both state and federal constitutions; as discussed above, this fee is valid under the federal constitution. Moreover, the California Supreme Court would likely reject Shell's argument that the magnitude of the fee evinces a discriminatory intent. Such an argument runs counter to "the oft-repeated principle that the judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business." *City of Pittsburgh v. Alco, supra,* at 417, U.S. 376. [sic, 417 U.S. at 376]

III. PREEMPTION OF SAFETY TERMS

By minute order of April 17, 1985, this Court ruled that Shell was not entitled to judgment on the claim that Santa Monica's proposed safety terms were preempted. Over the past year the parties have supplemented the record, and there have been significant legal developments bearing on this issue. Genuine factual disputes still prevent a finding as to whether the pipeline is "interstate" or "intrastate" as those terms are used in the Federal Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 2001 *et seq.* ("HLPSA"). However, it is now clear that, in either case, the Act does preempt Santa Monica from any and all safety regulation.

The HLPSA covers the "transportation of hazardous liquids" which are "in or affecting interstate or foreign commerce." 49 U.S.C. § 2001(3). The Act defines pipelines "in interstate or foreign commerce" as "interstate," and all other pipelines subject to the Act, namely those "affecting" interstate commerce, as "intrastate."

Santa Monica does not dispute that the Act preempts safety regulation of interstate pipelines. However, the City contends that Shell's pipeline is intrastate. This contention creates disputes of fact centered around application of the "shipper's intent" test. *See Burlington Northern v. Weyerhauser*, 719 F.2d 304 (9th Cir. 1983). As the record now stands, the interstate or intrastate character of the pipeline under the HLPSA cannot be determined. Therefore, it must be assumed, for purposes of ruling on Shell's motion for summary judgment, that this is an intrastate pipeline.

The HLPSA gives the Secretary of Transportation authority to establish safety standards for interstate and intrastate pipelines. The Secretary may, however, delegate to a "State agency" jurisdiction to prescribe safety standards for intrastate pipelines. That State agency must

submit to the Secretary an annual certification showing that it has regulatory jurisdiction, that it has adopted each minimum federal safety standard, that it is enforcing each such standard, that it is encouraging programs designed to prevent pipeline damage, and that it has authority to require certain record maintenance reporting and inspection. The term "State agency" is not specially defined in the Act, but its use in the Act clearly is limited to those State agencies to which regulatory authority has been delegated.

The federal act specifically provides that no State agency may impose any safety standards on interstate pipelines, but a State agency may adopt additional or more stringent safety standards for intrastate pipeline facilities. 49 U.S.C. § 2002(d). No State or municipal body may adopt or continue to enforce any safety regulation applicable to pipelines which affect interstate commerce unless it is a State agency to which regulatory authority has been delegated by the Secretary of Transportation.

The California legislature has determined that the State Fire Marshal is the State agency exercising the safety regulatory authority under the Federal Hazardous Liquid Pipeline Safety Act. Cal. Gov. Code §51010. On or about October 21, 1985, the State Fire Marshal obtained his certification from the Secretary of Transportation. The City of Santa Monica has not been so certified and so has no jurisdiction to regulate pipeline safety.

In a related development, the California Attorney General recently issued an opinion to the office of the State Fire Marshal. That opinion, issued January 8, 1986, concludes that a local government agency does not have power to impose safety regulations on an "intrastate" pipeline as that term is defined in the Federal Hazardous Liquid Pipeline Safety Act. That opinion appends an opinion from the U.S. Department of Transportation to the City of Long Beach, California, indicating that the

Department of Transportation takes the same view as the Attorney General. The reasoning of both the opinion of the Attorney General and the opinion of the Department of Transportation support the conclusion that Santa Monica may not regulate the safety of Shell's pipeline because the City is not a certified State agency as required under the HLPSA.

CONCLUSION

For the reasons given above, the price term in Santa Monica's proposed franchise renewal agreement does not violate the United States or the California constitution. Therefore, Santa Monica's motion for summary judgment dismissing Shell's cause of action challenging the franchise fee is hereby GRANTED. The provisions of the proposed renewal which govern safety are, however, preempted by federal law. Therefore, Shell's motion for summary judgment invalidating any and all safety terms which Santa Monica attempts to incorporate into the franchise renewal is hereby GRANTED.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: June 11, 1986.

/s/ ROBERT J. KELLEHER
Senior District Judge

APPENDIX C

FILED
JAN 11 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Nos. 86-6103, 86-6206

USDC No. CV-82-2362-RJK

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELL OIL COMPANY, a Delaware corp.,
Plaintiff-Appellant-Cross-Appellee,
v.

CITY OF SANTA MONICA, a municipal corp.,
Defendant-Appellee-Cross-Appellant.

ORDER

Before: PREGERSON, NELSON, and WIGGINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

ENTERED
JUN 18 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
JUN 17 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

No. CV 82-2362-RJK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHELL OIL COMPANY,
a Delaware corporation,
Plaintiff,

v.

CITY OF SANTA MONICA,
a municipal corporation,
Defendant.

JUDGMENT

In accordance with the Memorandum of Decision and Order filed June 12, 1986, defendant's motion for summary judgment dismissing plaintiff's cause of action challenging the defendant's proposed franchise fee is hereby GRANTED. Plaintiff's motion for summary judgment declaring invalid all franchise terms governing pipeline safety is hereby GRANTED.

The Clerk shall send, by United States mail, a copy of this Judgment to counsel for the parties.

DATED: June 16, 1986.

/s/ Robert J. Kelleher
Senior District Judge

APPENDIX E

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FILED
FEB 18 1986
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Attorneys for Plaintiff
SHELL OIL COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 82 2362-RJK (Gx)

SHELL OIL COMPANY,
a Delaware corporation,
Plaintiff,
vs.

CITY OF SANTA MONICA,
a municipal corporation,
Defendant.

STATEMENT OF GENUINE ISSUES OF FACTS SUBMITTED BY PLAINTIFF SHELL OIL COMPANY [Local Rule 7.14.2]

DATE: March 3, 1986
TIME: 10:00 A.M.
CTRM: 21

Shell Oil Company hereby submits its Statement of Genuine Issues of Fact as follows:

1. What is the maximum amount of a fee which would (a) reimburse the City of Santa Monica for the cost of any services furnished by it in connection with the operation of the pipeline, and (b) compensate the City for the reasonable value of any rights the City would surrender to Shell under the renewal franchise?

In addition, the City has suggested other issues which Shell does not believe are relevant. If the Court should determine that the issues are relevant, then the following also remain as genuine issues of fact:

2. Although the parties' safety experts recommended safety improvements to the pipeline (see defendant's Proposed Statement of Uncontroverted Facts at paragraph 18), the question of whether the recommended safety improvements were instituted and whether or not the pipeline is safe, as contended by Shell and as shown in the Declarations of William Doble and Juan Mendoza submitted by Shell in opposition to the City's motion for summary judgment, apparently remain in dispute.

3. Although at one time the pipeline transported approximately 23,700 barrels of crude oil per day as set forth in item 19 of the City's Statement of Uncontroverted Facts, in the last quarter of 1985 the pipeline transported approximately 32,862 barrels of crude oil per day, approximately 89% of which was delivered to Shell's Wilmington Refinery. Shell doubts that defendant City would controvert that fact which is established by the Declaration of Henry A. Babuszczak.

4. Although Shell does not contend that continued production at the Wilmington Refinery depends upon the continued operation of the pipeline (see defendant's Proposed Statement of Uncontroverted Facts at paragraph

27), it does contend, as set forth in the Declaration of Henry A. Babuszczak, that the pipeline does give Shell a reliable source of crude oil for the operation of the Refinery. The various alternatives available to Shell are not reliable. See Declaration of Henry A. Babuszczak.

5. Although Shell could potentially increase the supply of crude oil available to its Wilmington Refinery through exchange agreements (see defendant's Proposed Statement of Uncontroverted Facts at paragraph 30), there is no guarantee it could so do and this would not, therefore, be a reliable source of oil. See Declaration of Henry A. Babuszczak.

6. Although the pipeline is only one of six pipelines which supply Shell's Wilmington Refinery (see defendant's Proposed Statement of Uncontroverted Facts, paragraph 31), Shell is not sure that the loss of crude oil from the Ventura pipeline could be reliably made up by the remaining five pipelines. See Declaration of Henry A. Babuszczak.

7. Although the alternatives set forth in items 32, 33 and 34 of defendant City's Proposed Statement of Uncontroverted Facts potentially exist, those alternatives could not reliably supply the crude oil now carried by the Ventura pipeline. See Declaration of Henry A. Babuszczak.

8. Although most of the crude oil transported by the pipeline is produced within the State of California (see defendant's Proposed Statement of Uncontroverted Facts at paragraph 36), 45 percent is produced on the Outer Continental Shelf. See Declarations of D.J. Kingston and Henry A. Babuszczak. Shell doubts that the City will contest this fact.

9. Since 1970 the Ventura pipeline has ruptured five times, not seven times as set forth in paragraph 42 of the City's Proposed Statement of Uncontroverted Facts.

Furthermore, three of those leaks were caused by heavy equipment operators (not Shell personnel) puncturing the pipeline. With respect to the other two leaks, one occurred when the line was being pressure tested and the other leak occurred at the Santa Clara River where flooding eroded the soil around the pipeline. See Declarations of William Doble and Juan A. Mendoza.

10. Although the chances for injury are increased by reason of the facts set forth as items 45, 46, 47 and 48 of defendant's Proposed Statement of Uncontroverted Facts, the pipeline is nevertheless exceptionally safe and the sorts of hazards mentioned there occur whenever pipelines pass through an urban area. See Declaration of William Doble.

DATED: February 18, 1988

Respectfully submitted,

HANNA AND MORTON
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CYNTHIA L. BURCH
J. NILE KINNEY
MARK A. BYRNE

By /s/ EDWARD S. RENWICK

Attorneys for Plaintiff
SHELL OIL COMPANY

APPENDIX F

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Attorneys for Defendant
CITY OF SANTA MONICA.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 82 2362-RJK

SHELL OIL COMPANY,
a Delaware corporation,
Plaintiff,
vs.

CITY OF SANTA MONICA,
Defendant.

STATEMENT OF GENUINE ISSUES OF MATERIAL FACT [Local Rule 7.14.2, 7.14.4]

DATE: April 7, 1986
TIME: 10:00 A.M.
Courtroom: 21

Pursuant to Local Rules 7.14.2 and 7.14.4, defendant City of Santa Monica, ("City") hereby submits City's Statement of Genuine Issues of Material Fact. The City

submits this Statement only for the purpose of opposing Shell Oil Company's ("Shell's") Statement of Uncontroverted Facts filed in support of Shell's Cross-Motion for Partial Summary Adjudication. The City contends that under its theory of the case presented in the City's Motion for Summary Judgment to be heard concurrently herewith, there remain no genuine issues of material fact to be tried. The City also contends that the "uncontroverted facts" submitted by Shell do not support the conclusions of law contained in that statement.

1. What percentage of crude oil transported by the pipeline is produced on the Outer Continental Shelf. Shell currently contends that the amount is 45%; City disputes this figure based upon previous figures supplied by Shell and disputes whether the percentage can be accurately calculated given the number of changes in title to the crude between the time it is produced on the Outer Continental Shelf and the time it enters the pipeline; and given the fact that Shell admits it enters the pipeline in a "commingled stream." *See* Interrogatory Number 213, pp. 156-158; Deposition of Henry Babuszczak, pp. 160-162.

2. Whether Shell has alternatives to transporting its crude by pipeline laid in a right-of-way under the streets of Santa Monica.

3. Whether safety conditions and a higher franchise fee would place a direct and substantial burden on interstate commerce.

4. Whether refusing to franchise with Shell would place a direct and substantial burden on interstate commerce.

5. What amount reflects the fair market value of the subject right-of-way.

6. Whether the City's safety concerns are non-illusory.

7. Although it is true that the proposed franchise terms contained safety conditions (*See* Shell's Statement of

Uncontroverted Facts No. 10), the City disputes that this constitutes "regulation" of the pipeline.

8. Although it is true that the Southern California Gas Company Franchise does not contain detailed safety regulations, the city contends that the Gas Company is subject to other state regulations to which Shell is not, *see, e.g.* Public Utilities Code Sections 471, 770, and also provides a public benefit which Shell does not.

DATED: March 24, 1986

Respectfully submitted,

ROBERT M. MYERS
City Attorney

By: /s/MARY H. STROBEL
Deputy City Attorney

Attorneys for Defendant.